Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EXZAVIOUS LEE GIBSON,

Petitioner,

v.

TONY G. TURPIN, WARDEN,
Georgia Diagnostic and Classification
Center,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of Georgia

Decided: February 22, 1999

S97R1412. GIBSON v. TURPIN, WARDEN.

HINES, Justice.

Exzavious Lee Gibson was convicted of armed robbery and malice murder in 1990, and was sentenced to death. This Court affirmed the judgments of conviction and sentences entered thereon on direct appeal, *Gibson v. State*, 261 Ga. 313 (404 SE2d 781) (1991), and the United States Supreme Court denied certiorari. *Gibson v. Georgia*, 502 U.S. 1101 (112 SC 1188, 117 LE2d 430) (1992). On December 20, 1995, Gibson filed a petition for writ of habeas corpus asserting ineffective assistance of counsel, prosecutorial misconduct, and other claims. The habeas corpus court denied Gibson's request for relief on March 11, 1997, and he filed an application for certificate of probable cause to appeal with this Court. Because there is no state or federal constitutional right to an appointed lawyer upon habeas corpus and because Gibson's remaining claims are without merit, we deny Gibson's application for certificate of probable cause to appeal.

The evidence supporting Gibson's convictions and death sentence is detailed in *Gibson*, 261 Ga. at 313-14 (1). Gibson entered a grocery store and killed the owner with a knife by stabbing and slashing him thirty-nine times. He attacked with such force that the blade of the knife broke in the victim's neck vertebrae, and still he continued stabbing with the handle and blade remnant. Acting on information

provided by a witness, the police arrested Gibson at his house. Bloody money, bloody clothes and the victim's wallet were found in Gibson's bedroom. Gibson confessed that he robbed and murdered the victim because he needed money for drugs, and because he had been in the store earlier on the day of the crimes and the victim had chastised him for using profanity. Gibson also told the police that he had no regrets about what he had done.

1. Gibson claims that he was denied his constitutional rights because he did not have state-funded counsel to represent him during his habeas corpus proceedings. Gibson's direct appeals were exhausted in 1992, when the United States Supreme Court denied his petition for certiorari and motion for rehearing. With the assistance of the Georgia Appellate and Educational Resource Center ("Resource Center"),[1] Gibson filed his petition for writ of habeas corpus on December 20, 1995. He was not facing a scheduled execution date when the petition was filed. Gibson and the Resource Center, who appeared as amicus curiae throughout his case, repeatedly moved for a continuance of the evidentiary hearing because the Resource

[1] The Resource Center was created in 1988 through the joint efforts of this Court, the State Bar of Georgia, the Georgia Attorney General, and the federal judiciary to provide expert assistance to attorneys who volunteer to represent indigent, death-row inmates in post-conviction proceedings. The Resource Center obtains volunteer counsel for death-sentenced inmates, and sometimes directly represents prisoners through its staff attorneys.

Center had not located volunteer counsel to represent him.[2] The Resource Center also repeatedly claimed that it lacked the staff to directly represent him. The motions for a continuance were denied.

At the habeas corpus evidentiary hearing in September 1996, a lawyer with the Resource Center, Elizabeth Wells, appeared as amicus curiae to protest the case going forward. The habeas court invited Ms. Wells to represent Gibson, but she refused. Ms. Wells stated that the Resource Center would represent Gibson as counsel of record, but only if the habeas court would reschedule the case so as to allow her time to review the record. The habeas court declined granting a continuance based on this conditional offer. After the evidentiary hearing, the habeas court issued a final order denying Gibson relief from his convictions and sentences. Gibson maintains that his constitutional rights were violated because the State of Georgia did not provide him with a state-funded attorney for his habeas corpus proceedings. We disagree.

It is well settled that there is no federal or state constitutional right to appointed counsel in Georgia habeas

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[2] In addition to assisting Gibson with the preparation and filing of his habeas corpus petition, the Resource Center filed the following motions in his case: Amicus Curiae Motion for Reconsideration of Scheduling Order (February 19, 1996), Amicus Curiae Motion for Reconsideration of Scheduling Order (March 25, 1996), Amicus Curiae Motion to Reconsider Scheduling Order (May 10, 1996), Amicus Curiae Motion for Hearing on Amicus Curiae Motion to Reconsider Scheduling Order (May 17, 1996), Amicus Curiae Motion for Ruling on Previously Filed Motions (August 16, 1996), Additional Amicus Curiae Motion to Reconsider Scheduling Order (August 16, 1996), Amicus Curiae Motion for Hearing on Additional Amicus Curiae Motion to Reconsider Scheduling Order (August 16, 1996), and Amicus Curiae Motion for Reconsideration of Final Order (March 20, 1997). The Resource Center also assisted Gibson in the preparation and filing of his Motion to Adopt Motions Filed by Amici Curiae.

corpus proceedings. *Coleman v. Thompson*, 501 U.S. 722, 755-58 (111 SC 2546, 115 LE2d 640) (1991)(capital case); *Murray v. Giarratano*, 492 U.S. 1, 11-12 (109 SC 2765, 106 LE2d 1) (1989) (capital case); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (107 SC 1990, 95 LE2d 539) (1986); *State v. Davis*, 246 Ga. 200, 201-02 (269 SE2d 461) (1980) (capital case); *Stephens v. Balkcom*, 245 Ga. 492, 492-93 (3) (265 SE2d 596) (1980). Under the United States Constitution, the state is required to provide counsel to indigent defendants for their trial, *Gideon v. Wainwright*, 372 U.S. 335 (83 SC 792, 9 LE2d 799) (1963), and for their first appeal as a matter of right, *Douglas v. California*, 372 U.S. 353 (83 SC 814, 9 LE2d 811) (1963), but no further. The Constitution does not even require states with multi-tiered appellate systems to appoint appellate counsel through the exhaustion of an indigent defendant's discretionary direct appeals. *Ross v. Moffitt*, 417 U.S. 600 (94 SC 2437, 41 LE2d 341) (1974).

After his direct appeals are ended, a prisoner may seek a writ of habeas corpus alleging that his trial and direct appeals included substantial error under the federal or state constitutions. OCGA § 9-14-42 (a). However, habeas corpus is not a criminal proceeding, but is considered to be civil in nature. *Finley*, 481 U.S. at 557; *Nolley v. Caldwell*, 229 Ga. 441, 441 (4) (192 SE2d 151) (1972). It is a collateral attack that is separate and distinct from direct review, and occurs only after a prisoner has failed to obtain relief by direct appeal. Id. It is not an extension of direct appeal:

> Habeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have otherwise become final.
> It is not designed as a substitute for direct review.

Mackey v. United States, 401 U.S. 667, 682-83 (91 SC 1160, 28 LE2d 404) (1971) (Harlan, J., concurring in part and dissenting in part)(emphasis in original). Habeas corpus is

not intended to be a means for re-litigating a prisoner's case. See *Gunter v. Hickman*, 256 Ga. 315, 316 (1) (348 SE2d 644) (1986) (issues raised and decided on direct appeal cannot be reasserted in habeas corpus proceedings); *Black v. Hardin*, 255 Ga. 239, 240 (4) (336 SE2d 754) (1985) (failure to raise an alleged error on direct appeal will ordinarily preclude habeas corpus review). No state is obligated under the United States Constitution to provide habeas corpus proceedings as a means of obtaining post-conviction relief. *Finley*, 481 U.S. at 557. Habeas corpus review is not a second trial.

Exzavious Lee Gibson was arrested nine years ago for murder. Because he was indigent, the trial court appointed a lawyer who was experienced in death penalty litigation to defend him at the state's expense. Gibson's lawyer investigated and tried the case. A jury of Gibson's peers, after receiving the overwhelming evidence of his guilt and the brutality of the murder, convicted him and sentenced him to death. Gibson's appointed, state-funded lawyer appealed, raising numerous enumerations of error. This Court, finding no harmful error with Gibson's trial, unanimously affirmed his convictions and sentences. *Gibson*, 261 Ga. at 317. The entire process, trial and direct appeal, was governed by the Unified Appeal Procedure ("UAP"), OCGA § 17-10-36, which utilizes a checklist to ensure that "all possible matters which could be raised in defense have been considered by the defendant and defense counsel and either asserted in a timely and correct manner or waived in accordance with applicable legal requirements." OCGA § 17-10-36 (b); UAP § I (A). An appointed lawyer represented Gibson at every stage of his criminal defense.

After his direct appeals were exhausted, Gibson exercised his right under the Georgia constitution to petition for writ of habeas corpus. However, he asserts that this is an empty right because the lack of a state-funded lawyer prevents him from adequately raising his claims. This Court

has previously addressed whether the lack of appointed counsel denies an indigent death-row petitioner meaningful access to the courts under *Bounds v. Smith*, 430 U.S. 817 (97 SC 1491, 52 LE2d 72) (1977), and has held that it does not. *Davis*, 246 Ga. at 201. In *Davis*, this Court further held that there is no exception for death-row inmates based upon the irrevocability of death, reasoning that, if meaningful access to the courts meant appointed counsel, all habeas corpus petitioners would be entitled to appointed counsel. Id.

The dissent seeks to stretch the right of meaningful access to the courts beyond its constitutional bounds. Meaningful access means that state authorities must ensure that inmates have "'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'" *Lewis v. Casey*, 116 SC 2174, 2180 (1996), quoting *Bounds*, 430 U.S. at 825. For example, a state may not interfere with an inmate's attempt to prepare or file legal documents, and a state must waive filing fees for indigent inmates. *Lewis*, 116 SC at 2179. Meaningful access does not mean that a state must help inmates discover grievances, or litigate effectively when in court. *Lewis*, 116 SC at 2181. It is simply the right of an inmate to raise his claims and be heard.

Gibson does not allege that Georgia did anything to prevent him from raising his claims. Instead, he asserts that Georgia should have financed his habeas corpus litigation by providing him with a lawyer at state expense. In other words, he raised his claims, but not as effectively as he would have preferred. Gibson, however, has cited no cases that entitle him to a lawyer in order to have meaningful access to the courts. While the United States Supreme Court has provided some examples of what resources provided to inmates may constitute meaningful access to the courts upon habeas corpus, such as adequate law libraries, *Bounds*, 430 U.S. at 830, it has never held that an appointed attorney is required. Indeed, the Supreme Court has specifically

disclaimed the idea that the Constitution requires the permanent provision of counsel so that inmates can litigate more effectively. *Lewis*, 116 SC at 2181.

The apparent rationale underlying Gibson's claim of lack of meaningful access to the courts is that he is not intelligent and habeas corpus law is complex ("Byzantine"). This rationale, however, does not distinguish him from the many non-capital habeas petitioners. Numerous prisoners have limited intellect and education, and many issues that arise in non-capital cases are complicated. The test for ineffective assistance of counsel outlined in *Strickland v. Washington*, 466 U.S. 668 (104 SC 2052, 80 LE2d 674) (1984), and *Smith v. Francis*, 253 Ga. 782 (325 SE2d 362) (1985), and the required showings necessary to prevail on this claim, are the same for non-capital cases as capital cases. If an appointed lawyer is truly *constitutionally* required in order to ensure meaningful access to the courts upon habeas corpus, courts would be hard-pressed to justify why only death-row inmates, and not all inmates, should have this *constitutional* right. "Death is different" is the only reason that this line could be drawn.

The "death is different" reason is often used to justify additional procedures and closer scrutiny in death penalty cases. The phrase is correct: death *is* different. Death penalty cases *do* require closer examination and the additional safeguards provided by law.[3] The citizens of this

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[3] For this reason, the Georgia death penalty statute is crafted to narrow the class of murderers who may receive the death penalty to the most culpable. OCGA § 17-10-30; *Gregg v. Georgia*, 428 U.S. 153, 196-97 (96 SC 2909, 49 LE2d 859) (1976). A convicted murderer can only receive a death sentence if the prosecution proves the existence of at least one statutory aggravating circumstance beyond a reasonable doubt. OCGA § 17-10-30 (c); *Gregg*, 428 U.S. at 197. In order to convince a jury that life imprisonment is the appropriate sentence, a capital defendant is permitted to introduce anything as mitigating evidence as long as it relates to his offense, background or character. *Barnes v. State*,

state should be, must be, appalled at the prospect of executing an innocent person, or a murderer undeserving of the ultimate punishment. But anyone familiar with the facts that underlie this petitioner's convictions and sentences, of what he did to a shopkeeper on February 2, 1990, knows that Exzavious Lee Gibson is neither innocent nor undeserving of the death penalty. "Death is different" is a crucial reminder of the gravity of a sentence where the state seeks to punish a defendant by taking his life, and of the need for procedural safeguards in the determination and carrying out of such a sentence, but it should not be used to construct constitutional rights that do not exist, or to usurp the legislature's role in determining the structure of our criminal justice system and the allocation of legal resources. Neither the federal nor Georgia constitutions require the appointment of a lawyer for a death-row inmate to have meaningful access to the courts upon habeas corpus. *Giarratano*, 492 U.S. at 11-12; *Davis*, 246 Ga. at 201.

The lack of appointed counsel upon state habeas corpus is also not "fundamentally unfair." Obviously, an attorney could better investigate, structure, and present Gibson's habeas claims than Gibson could. But this simple fact does not support an equal protection claim:

> The duty of the State under our cases is not to duplicate the legal arsenal that may be

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269 Ga. 345, 358-60 (27) (496 SE2d 674) (1998). A Georgia sentencing jury is also not instructed to weigh mitigating circumstances, and may return a life sentence for any reason or no reason at all. *Barnes*, 269 Ga. at 359 (27). If a defendant is mentally retarded, the death sentence may not be imposed in this state. OCGA § 17-7-131 (j). On appeal, this Court, in addition to reviewing for error, determines whether the death sentence is proportional to other death penalty cases when considering both the crime and the defendant, and whether the death sentence was imposed under the influence of impermissible passion, prejudice, or any other arbitrary factor. OCGA § 17-10-35 (c) (1) and (3); *Gregg*, 428 U.S. at 204-06.

> privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.

Finley, 481 U.S. at 556, quoting *Ross*, 417 U.S. at 616. Nor does it support a due process claim because the existence of habeas corpus "'does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way.'" *Finley*, 481 U.S. at 556, quoting *Ross*, 417 U.S. at 610-611.

Gibson further argues that he has a constitutional right to a state-funded lawyer upon habeas corpus because, as he had the same lawyer at trial and on direct appeal, it is his first opportunity to raise a Sixth Amendment claim of ineffective assistance of counsel. This argument, which the dissent asserts was left an "open question" by *Coleman*, 501 U.S. at 755-56, has since been rejected by every federal court of appeals that has considered it. *Mackall v. Angelone*, 131 F3d 442, 449, n. 13 (4th Cir. 1997); *Parkhurst v. Shillinger*, 128 F3d 1366, 1371 (10th Cir. 1997); *Hill v. Jones*, 81 F3d 1015, 1024-26 (11th Cir. 1996); *Bonin v. Calderon*, 77 F3d 1155, 1159-60 (9th Cir. 1996); *Nolan v. Armontrout*, 973 F2d 615, 616-17 (8th Cir. 1992). Two additional reasons for not creating this constitutional right bear consideration. First, as with meaningful access, if a constitutional right to habeas counsel exists for this reason it would apply to almost all habeas corpus petitioners, and not just to death-row inmates. Second, a constitutional right to habeas counsel, carried to its logical conclusion, would spawn more litigation and delay in an already cumbersome system. This Court and the United States Supreme Court have long held that the constitutional right to counsel is the right to effective counsel. *Strickland*, 466 U.S. at 686; *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (90 SC 1441, 25 LE2d 763) (1970); *Black v. State*, 264

Ga. 550, 550 (1) (448 SE2d 357) (1994); *Pitts v. Glass*, 231 Ga. 638, 639 (203 SE2d 515) (1974). Presumably, if there is a constitutional right to counsel upon state habeas corpus, an additional Sixth Amendment claim will exist in Georgia: ineffective assistance of habeas counsel. See *Wainwright v. Torna*, 455 U.S. 586, 587-88 (102 SC 1300, 71 LE2d 475) (1982) (a defendant can only be deprived of his Sixth Amendment right to effective assistance of counsel where there is a constitutional right to counsel).[4] Also, if the same reasoning applies, a petitioner who raises this new claim must have appointed counsel to do so, because it is his first opportunity to raise this constitutional claim with regard to his habeas counsel. There will be collateral proceedings to consider alleged Sixth Amendment error in previous collateral proceedings. See *Bejarano*, 929 P2d at 925 (if ineffective assistance of post-conviction counsel is a viable claim then "claims of ineffective assistance of counsel in the immediate prior proceeding may be raised ad infinitum").

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[4] Jurisdictions that provide a *statutory* right to post-conviction counsel have addressed a claim of ineffective assistance of post-conviction counsel in different ways. Some reason that such a claim is not viable because there is no constitutional right to post-conviction counsel, see *House v. State*, 911 SW2d 705, 712 (Tenn. 1995) (despite statute providing for appointed post-conviction counsel, there is no cognizable claim of ineffective assistance of post-conviction counsel); or that, when statutory appointment of counsel is discretionary, there is no right to effective post-conviction counsel, see *Bejarano v. Warden*, 929 P2d 922, 925 (Nev. 1996) (since petitioner is not statutorily entitled to post-conviction counsel, there is no viable claim of ineffective assistance of post-conviction counsel); or that there is a full statutory right to effective assistance of post-conviction counsel, see *Lozada v. Warden*, 613 A2d 818, 821-24 (Conn. 1992) (claim of ineffective assistance of post-conviction counsel is a viable claim because statute requires the appointment of post-conviction counsel). We note that federal law specifically prohibits a claim of ineffective assistance of state or federal habeas corpus counsel as a ground for a state prisoner obtaining federal habeas corpus relief. 28 U.S.C. § 2254 (i).

In determining what is constitutionally required, a relevant inquiry is also what is the contemporary practice. As part of his claim of lack of fundamental fairness, Gibson asserts that Georgia is one of only two states that does not permit appointed counsel for indigent death-sentenced habeas corpus petitioners. However, closer examination reveals that no state, save for Mississippi, has recognized a *constitutional* right to appointed counsel upon habeas corpus. See *Jackson v. State*, No. 98-DR-00708-SCT, 1999 WL 33904 (Miss. Jan. 28, 1999). Almost every jurisdiction that provides state-funded counsel to indigent death-row habeas corpus petitioners does so by statute. See Ala. Code § 15-12-23 (a) (1995) (subject to judicial discretion); Ariz. Rev. Stat. Ann. §§ 13-4041 (B), 4234 (D) (West Supp.1998); Ark. Code Ann. § 16-91-202 (a) (1) (Michie Supp.1997); Cal. Gov't Code § 68662 (West Supp. 1999); Colo. Rev. Stat. § 21-1-104 (1997); Conn. Gen. Stat. § 51-296 (a) (1998); Fla. Stat. Ann. § 27.702 (West Supp. 1999); Idaho Code § 19-4904 (Michie 1997) (subject to judicial discretion); 725 Ill. Comp. Stat. Ann. § 5/122-2.1 (a) (1) (West 1992); Ind. Code Ann. § 33-1-7-2 (a) (Lexis 1998); Kan. Stat. Ann. § 22-4506 (1995) (subject to judicial discretion); Ky. Rev. Stat. Ann. § 31.110 (2) (c) (Banks-Baldwin 1991); La. Code Crim. Proc. Ann. art. 930.7 (West 1997) (subject to judicial discretion); Md. Ann. Code art. 27, § 645A (f) (1) (1998); Mo. Ann. Stat. § 600.042 (West Supp. 1999); Mont. Code Ann. § 46-21-201 (1997); Neb. Rev. Stat. Ann. § 29-3004 (Michie 1995) (subject to judicial discretion); Nev. Rev. Stat. Ann. § 34.750 (1) (Michie 1996) (subject to judicial discretion); N.J. Stat. Ann. § 2A:158A-5 (West Supp. 1998); N.Y. Jud. Law § 35-b (McKinney Supp. 1999); N.C. Gen. Stat. § 7A-451 (a) (2) (1995); Ohio Rev. Code Ann. §§ 120.06, 120.16, 120.26 (Anderson 1998) (subject to public defender discretion); Okla. Stat. Ann. tit. 22 § 1355.6 (B) (West Supp. 1999); Or. Rev. Stat. § 138.590 (3) (1990); S.C. Code Ann. § 17-27-160 (B) (West Supp. 1998); S.D. Codified Laws § 21-27-4 (Michie 1987); Tenn. Code Ann. § 40-30-306 (a) (1997); Tex. Crim. P. Code Ann. § 11.071 (West Supp. 1999); Utah

Code Ann. § 78-35a-202 (1998); Va. Code Ann. § 19.2-163.7 (Michie 1995); Wash. Rev. Code Ann. § 10.73.150 (West Supp. 1998); see also 21 U.S.C. § 848 (q) (4) (B) (right to qualified legal representation for capital petitioners in federal habeas corpus proceedings).[5] The contemporary practice thus illustrates that a law providing appointed counsel to indigent death-row habeas petitioners usually results from legislative enactment, not judicial fiat.

Gibson claims that Georgia is constitutionally required to provide counsel in death penalty habeas corpus proceedings in order to ensure the fundamental fairness of Georgia's death penalty procedures and meaningful access to the courts. This assertion, which ignores the collateral purpose of habeas corpus, would lead to the judicial creation of a right not found in the federal or state constitutions, or resulting from the exercise of the legislative process. We do not say that a law providing state-funded counsel to indigent death-row habeas petitioners lacks merit. In fact, such a law might be good policy. "But, while we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators." *Gregg*, 428 U.S. at 174-75. A law requiring appointed counsel for capital habeas petitioners is not constitutionally compelled, and therefore, the decision to create such a law rightfully belongs to the General Assembly.

2. Gibson alleges that his trial counsel was ineffective due to numerous errors and omissions, including failure to object to preserve error at trial, failure to make important pretrial motions, and failure to adequately

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[5] We note that some of these statutes were recently enacted so that the states could opt-in to Chapter 154 of the federal Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 18 U.S.C. §§ 2254 and 2261-66. See, e.g., Ark. Code Ann. § 16-91-204 (1997) (legislative intent of statute requiring appointed counsel in capital post-conviction proceedings is to obtain expedited federal review under the AEDPA).

investigate and present key mitigation evidence. Gibson's trial counsel testified at the habeas corpus evidentiary hearing and we have examined the record from that hearing and the record of Gibson's trial and direct appeal.

In order to prevail on a claim of ineffective assistance of counsel, Gibson must show that his trial counsel's performance was deficient and that this deficient performance actually prejudiced his defense. *Strickland*, 466 U.S. at 687; *Smith*, 253 Ga. at 783 (1). Under this standard, Gibson's trial counsel is afforded a strong presumption that his performance fell within a wide range of reasonable professional conduct. *Smith*, supra. To show actual prejudice, Gibson must demonstrate that, but for trial counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different. Id.

Based on the record, we are able to determine the following: Gibson's counsel, William Dennis Mullis, was appointed to defend Gibson shortly after his arrest. Mr. Mullis was the contract public defender for the judicial circuit, and had previously defended two death penalty cases. Mullis met with Gibson many times before trial and found him to be rational and cooperative. Gibson was able to assist Mullis by providing the names of potential mitigation witnesses.

The evidence of Gibson's guilt was overwhelming. A witness saw and recognized Gibson running from the grocery store immediately after the killing. A police officer, acting on this information, went to Gibson's house only fifteen minutes after the murder, and was invited inside by Gibson's grandmother. The police officer followed a trail of fresh blood droplets back to Gibson's bedroom where he discovered bloody money, bloody clothes and the victim's wallet. Gibson was found hiding in a closet. His shoes were consistent with bloody shoe prints found in the grocery store.

Gibson gave two statements, one written and one videotaped. In both statements he confessed to the murder and armed robbery.

Mullis investigated Gibson's case. He examined the entire state's file because the district attorney had an open file policy. He interviewed several law enforcement witnesses and the woman who had seen and recognized Gibson leaving the grocery store after the murder. He called the doctor who conducted the autopsy. Mullis filed several discovery motions, including a *Brady* motion, and he attempted to subpoena employees of the state crime lab to produce their testing materials. In addition to a court-ordered psychological evaluation to determine competency, Mullis successfully moved for an independent psychological evaluation.

Mullis filed additional pretrial motions. He moved to suppress the items discovered in Gibson's bedroom, claiming an illegal warrantless search. He moved to suppress Gibson's statements, claiming that Gibson had been under the influence of narcotics when he waived his *Miranda* rights. Mullis also moved for a change of venue because there had been several articles in local newspapers that he believed to be inflammatory. The trial court reserved ruling on the change of venue request until the completion of voir dire, and then denied it due to the few jurors biased by pretrial publicity. The trial court granted a motion requesting the completion of a pretrial juror questionnaire.

The psychologist who performed the court-ordered evaluation was Dr. Robert J. Storms. Dr. Storms determined that Gibson was competent to stand trial and was not insane at the time of the murder. Mullis contacted Dr. Storms regarding possible mitigation issues and Dr. Storms informed him that Gibson's IQ was in the 80s, and that he was not mentally retarded. Dr. Storms also told Mullis that he had not uncovered any past history of child abuse, and

that Gibson had been in considerable trouble with the law, leading to stays in various youth detention institutions. Dr. Storms stated that Gibson "had not had a particularly wonderful upbringing" and "it seems like he essentially raised himself."

Another psychologist, Dr. George T. Anderson, performed the independent examination of Gibson. He reported to Mullis that Gibson had a tested IQ of 76, which is borderline intelligence, but that Gibson was "certainly not retarded." Dr. Anderson stated that Gibson's IQ was probably five or six points higher than he tested because Gibson had not tried very hard on the test -- he "didn't act like he cared one way or the other." Dr. Anderson also reported that Gibson's mother died when he was two years old, that his father had not been involved in his life, and that he was raised by an aunt in Maryland. Gibson abused alcohol and drugs, and had spent some time in a juvenile facility and a Florida jail for a variety of offenses. Gibson has no brothers or sisters.

Mullis contacted Gibson's family members about possible mitigation evidence. The aunt who raised Gibson, Faustine Christopher, agreed to testify. Mullis also spoke with another aunt and Gibson's grandmother. Gibson told Mullis that Christopher had used corporal punishment on him, but no relatives corroborated any history of childhood abuse. Although Gibson's grandmother lived in Dodge County, she did not testify because she "didn't want to get involved" and Mullis believed that she could not offer much favorable evidence. Mullis did locate an acquaintance in Dodge County who agreed to testify about Gibson's peaceful nature (Gibson had only lived in Dodge County about two months before the murder).

Despite the overwhelming evidence of Gibson's guilt, Mullis did not believe anything would be gained by pleading guilty and going to trial only on sentencing. At

trial, Mullis successfully moved to prevent the jury from seeing the video portion of Gibson's confession because it depicted Gibson wearing handcuffs,[6] and he was successful in keeping out cumulative photographs of the victim's body. Mullis was also concerned about the autopsy report, which indicated that the victim had been paralyzed from the neck down by the stab wound that broke the knife blade. He believed that this would be very damaging aggravation evidence because the jury would hear that Gibson had continued to assault a helpless victim. After the autopsist testified that the neck wound had left the victim as helpless as a "rag doll" and that Gibson had continued to stab with the remnant of the knife, Mullis managed to impeach the autopsist with a statement he made to Mullis during their pretrial telephone conversation. The doctor conceded that the neck wound that resulted in the broken blade could have been the final wound.

During the sentencing phase, the state introduced evidence of an escape attempt by Gibson. Three months before trial, Gibson escaped from his cell at the city jail and was caught inside the building. The police discovered a letter addressed "To the Police" on Gibson's bunk when they first noticed he was missing. Gibson's letter described his "magnificent escape" in a mocking, condescending tone. The letter and police testimony about the escape were introduced over defense objection. To counter this evidence, Mullis used Gibson's testimony in the sentencing phase to explain that this event was not actually an escape but an attempt to get transferred from the city jail to the county jail, which Gibson believed to be more comfortable. Regarding the letter, Mullis testified at the habeas corpus hearing that he had warned Gibson, as he does all his clients, not to write

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[6] Mullis believed that it was important to prevent the jury from seeing the video because of Gibson's remorseless demeanor during his confession. The jury was permitted to hear the confession.

anything in jail that could be used by the state, but Gibson had ignored him.

Mullis testified that his mitigation strategy was "two-pronged." He planned to focus on Gibson's youth (seventeen years old at the time of the murder) and his lack of a home life while growing up. Gibson's aunt, Faustine Christopher, testified that Gibson's father had left his mother when Gibson was only a few months old, and that his parents had never been married. When Gibson was only two years old, his mother was murdered. Ms. Christopher further testified that she raised Gibson, who was a playful child until he began to get into trouble when he was fourteen years old. Another witness, Sharon Jordan, testified that she had known him during the short time he had lived in Dodge County and that he had a peaceful nature. Then Gibson testified, expressing remorse and explaining that he had been high on drugs when he killed the victim. He also testified that he was only seventeen years old when he committed the murder. In his closing argument, Mullis invoked Gibson's youth and his lack of a family while growing up. He implored the jury to spare Gibson, saying to do so would be Christian. The jury returned a recommendation of death.

Mullis's representation of Gibson was not deficient. See *Strickland*, 466 U.S. at 687. Mullis investigated Gibson's possible defenses, interviewed key witnesses, and discovered that Gibson was competent and not mentally retarded. Mullis therefore elected to present evidence in the sentencing phase of Gibson's youth, his remorse, and his childhood without parents. We cannot conclude that this decision was not made in the exercise of reasonable professional judgment. Id. at 690; *Smith*, 253 Ga. at 783 (1). In addition, the record reveals that Mullis filed numerous relevant pretrial motions and made timely objections at trial. Mullis's conduct fell within the wide range of reasonable professional conduct permitted in *Strickland*. Id.

Furthermore, even if we were to assume that Gibson's counsel was deficient, Gibson cannot show actual prejudice. *Strickland*, 466 U.S. at 694; *Smith*, supra. The murder was extremely brutal; the victim was savaged with dozens of stab and slash wounds. The attack was so violent the victim's spinal cord was severed and knife blows to the head resulted in superficial skull fractures. In his recorded statement, Gibson told the police that he had entered the store and begun stabbing the victim without saying anything or giving the victim a chance to turn over the money without a fight. He said that he had no regrets about what he had done. Gibson's escape attempt, in conjunction with his mocking letter to the police, also showed that he was a difficult prisoner and an escape risk. In addition, two psychological examinations revealed that Gibson was not mentally ill or retarded. Under these circumstances, Gibson cannot demonstrate that there was a reasonable probability that, assuming his lawyer's representation was deficient, the outcome of his trial would have been different. Id. The habeas court did not err by denying Gibson's claim of ineffective assistance of trial counsel.

3. Gibson asserts that the habeas court erred by scheduling his case to conform with the time limits established by Uniform Superior Court Rule 44 for the litigation of a capital habeas corpus case. This claim is without merit. *Davis v. Thomas*, 266 Ga. 835, 838 (471 SE2d 202) (1996) (habeas court has broad discretion in controlling its calendar).

4. The habeas court's adoption of a final order drafted by the state was not error. *Jefferson v. Zant*, 263 Ga. 316, 316-17 (1) (431 SE2d 110) (1993).

5. Gibson's remaining habeas claims are procedurally defaulted because they could have been raised on direct appeal and were not. *Black*, 255 Ga. at 240 (4); OCGA § 9-14-48 (d). These claims include allegedly

prejudicial remarks made by the state in its closing argument, the state's alleged failure to disclose exculpatory evidence, and the constitutionality of the Unified Appeal Procedure.

Application for certificate of probable cause to appeal denied. All the Justices concur, except Benham, C.J., Fletcher, P.J., and Sears, J., who dissent.

S97R1412. GIBSON v. TURPIN, WARDEN.

FLETCHER, Presiding Justice, dissenting.

I dissent because the state and federal constitutions require appointment of counsel for a death penalty inmate who is pursuing his first habeas corpus petition and who is seeking to challenge his conviction and sentence on a basis not available on direct appeal.[1] Counsel for this habeas petitioner is required in order to protect the constitutional guarantee of meaningful access to the courts because of the complexity of habeas corpus law and the importance of habeas review in ensuring fundamental fairness in capital cases.

The same counsel represented Gibson at trial and on direct appeal. This habeas petition is therefore Gibson's first opportunity to challenge his conviction and sentence on the ground of ineffective assistance of counsel.[2] The habeas court denied the motion of amicus for a continuance for obtaining pro bono counsel and conducted an evidentiary hearing over Gibson's objection that he had no attorney. The record shows that Gibson has an eighth grade education and

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[1] Although the posture of this case is a request for a certificate of probable cause to appeal, the issue of Gibson's right to counsel has been fully briefed by both sides and the record of the habeas court is before us. Additionally, the Court has the benefit of amicus briefs.

[2] Castell v. Kemp, 254 Ga. 556, 558 (331 SE2d 528, 530) (1985).

is in the "borderline range of intelligence" with an IQ between 76 and 82. Following the hearing, the court made an ex parte request of the state to prepare an order, which the court then adopted verbatim.

The Georgia Constitution guarantees the right to seek habeas corpus relief.[3] The right to seek habeas review includes the right to meaningful access to the courts to pursue the habeas challenge.[4] As this Court recently stated, "[p]risoner access to the courts in order to challenge unlawful convictions . . . cannot be unjustifiably denied or obstructed."[5] The federal constitution provides similar protections.[6] The question becomes whether meaningful access and fundamental fairness require appointment of counsel in a capital post-conviction proceeding that provides the first opportunity to raise a constitutional challenge to the conviction and sentence. This is a question that the United States Supreme Court has never addressed and has specifically left open.[7]

The majority's reliance on Murray v. Giarratano[8] and State v. Davis[9] is unpersuasive because neither case involved

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[3] Ga. Const. Art. I, §. I, Par. XV.

[4] See Howard v. Sharpe, 266 Ga. 771, 772 (470 SE2d 678) (1996); Giles v. Ford, 258 Ga. 245 (368 SE2d 318) (1988); Johnson v. Caldwell, 229 Ga. 548, 550 (192 SE2d 900) (1972).

[5] Howard v. Sharpe, 266 Ga. 771, 772 (470 SE2d 678) (1996).

[6] Lewis v. Casey, 116 SC 2174, 2182 (1996) (state must provide "tools . . . inmates need in order to attack their sentences, directly or collaterally"); Bounds v. Smith, 430 U.S. 817, 821-823 (97 SC 1491) (1977) (prisoners have constitutional right to meaningful access to the courts).

[7] See Coleman v. Thompson, 501 U.S. 722, 755 (111 SC 2546, 115 LE2d 640) (1991).

[8] 492 U.S. 1 (109 SC 2765, 106 LE2d 1) (1989).

a death penalty inmate who was forced to proceed at his first habeas proceeding without counsel. Giarratano was not a habeas proceeding, but was a civil rights case seeking broad prospective relief. As Justice Kennedy observed in casting the deciding vote in Giarratano, Virginia already provided institutional lawyers to assist in preparing postconviction petitions and "no prisoner on death row in Virginia has been unable to obtain counsel to represent him in post conviction proceedings."[10] Similarly, Davis was never without counsel; he was simply without compensated counsel.[11] In Davis, this Court held only that the trial court erred in "appointing" the Prisoner Legal Counseling Project, and thus providing for payment.[12] The Court noted that lawyers with the PLCP were already providing legal advice and representation on a volunteer basis.[13] The first factor to consider in addressing the question of whether the constitution requires appointed counsel is the nature of the proceedings. The United States Supreme Court has recognized that an attorney's assistance in capital post-conviction proceedings is "crucial because of the complexity of . . . jurisprudence in this area."[14] As Justice Kennedy

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[9] 246 Ga. 200 (269 SE2d 461) (1980).

[10] Giarratano, 109 SC at 2773 (Kennedy, J., concurring).

[11] Davis' pro bono counsel continued to represent him through a second reversal in federal habeas proceedings and finally a guilty plea in exchange for a life without parole sentence. See Davis v. Kemp, 752 F.2d 1515 (11th Cir. 1985); Davis v. State, 261 Ga. 221, 222 (403 SE2d 800) (1991); Metro and State in Brief, ATLANTA CONST., May 29, 1993 at B2.

[12] 246 Ga. at 201.

[13] Id.

[14] McFarland v. Scott, 512 U.S. 849, 855 (114 SC 2568, 129 LE2d 666) (1994).

observed in Giarratano, post-conviction proceedings are a "central part of the review process for prisoners sentenced to death."[15] Troubling statistics confirm this: nearly half (46%) of all capital cases reviewed in federal habeas proceedings between 1976 and 1991 were found to have constitutional error.[16] In 1996, this Court also recognized the importance of counsel when Chief Justice Benham sent letters to approximately 80 law firms across this state requesting that each firm agree to represent an individual in a capital post-conviction case on a pro bono basis. As this case demonstrates, however, reliance on pro bono counsel is no longer adequate. Recently, the Supreme Court of Mississippi recognized that such reliance is insufficient and granted a motion for appointed and compensated counsel for a death row inmate in state post-conviction proceedings.[17] That court recognized that the uniqueness of death as a sentence and the complexity of post-conviction procedures require counsel in order to provide meaningful access to the courts.[18]

The need for counsel is even greater with the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254, 2262-66, Georgia's Death Penalty Habeas Corpus Reform Act of 1995 OCGA § 9-14-44, et seq., and Uniform Superior Court Rule 44. Together these enactments impose strict time limitations on habeas petitions in death penalty cases. A prisoner sentenced to die must file his or her federal habeas petition within one year of the

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[15] 492 U.S. at 14 (Kennedy, J. concurring).

[16] McFarland v. Scott, 512 U.S. 1256,1263 (114 SC 2785, 129 LE2d 896) (1994) (mem.) (Blackmun, J., dissenting).

[17] Jackson v. State, No. 98-DP-00708-SCT, 1998 WL 469953 (Miss. Jan. 28, 1999).

[18] Id.

conviction becoming final, with tolling allowed if state post-conviction proceedings are pending.[19] In Georgia, Rule 44 requires that a habeas petitioner file all pretrial motions within 60 days of filing a petition and complete discovery within 120 days. Rule 44 also requires the evidentiary hearing to be conducted within 180 days of the filing of the petition. Failure to meet these requirements will result in the absence of any hearing on the merits for the habeas petitioner. Furthermore, as the State Bar of Georgia points out in its amicus brief, the strict time limits of this rule actually discourage lawyers from accepting the Chief Justice's plea for pro bono assistance because the rules do not permit adequate time to become familiar with the Byzantine requirements of habeas corpus law.

It is also important to consider the claims being raised in the habeas petition. In this case, Gibson is seeking to challenge the effectiveness of his trial counsel, an issue that he has not been able to assert previously. It is well-established that indigent defendants are entitled to counsel for the direct appeal from the judgment of conviction and sentence.[20] A state that permits a defendant to raise a constitutional challenge to his death sentence only after the right to counsel has expired is treading heavily on the Sixth Amendment right to counsel, especially in light of the unusual importance of post-conviction proceedings in capital cases. Repeated reversals of convictions and death sentences in habeas proceedings demonstrate that the protections given in the trial and direct appeal stages of death penalty cases are often not sufficient to assure their reliability.[21] The fact that

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[19] 28 U.S.C. § 2244(d)(1).

[20] Douglas v. California, 372 U.S. 353, 358 (83 SC 814, 9 LE2d 811) (1963).

[21] See e.g., Roberts v. State, 263 Ga. 764 (438 SE2d 905) (1994) (referring to unpublished habeas decision reversing conviction and sentence); Nelson v. Zant, 261 Ga. 358 (405 SE2d 250) (1991); Ross v.

death sentences are not reimposed following a successful habeas petition underscores the importance of the habeas proceeding.[22] Furthermore, the United States Supreme Court

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Kemp, 260 Ga. 312 (393 SE2d 244) (1990) (per curiam); Birt v. State, 259 Ga. 800 (387 SE2d 879) (1990) (referring to unpublished habeas decision vacating death sentence); Curry v. Zant, 258 Ga. 527 (371 SE2d 647) (1988); Hardy v. State, 258 Ga. 523 (371 SE2d 849) (1988) (referring to unpublished habeas decision vacating death sentence); Floyd v. Stynchcombe, 252 Ga. 113 (311 SE2d 828) (1984); Zant v. Hamilton, 251 Ga. 553 (307 SE2d 667) (1983); Jarrell v. Kemp, 248 Ga. 492 (284 SE2d 17) (1981); Zant v. Gaddis, 247 Ga. 717 (279 SE2d 219) (1981); Amadeo v. Zant, 486 U.S. 214 (108 SC 1771, 100 LE2d 249) (1989); Dobbs v. Turpin, 142 F.3d 1383 (1998); Hill v. Turpin, 135 F.3d 1411 (11th Cir. 1998); Baxter v. Thomas, 45 F.3d 1501 (1995); Davis v. Zant, 36 F.3d 1538 (11th Cir. 1994); Burden v. Zant, 24 F.3d 1298 (11th Cir. 1994); Moore v. Zant, 972 F.2d 318 (11th Cir. 1992); Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991); Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991); Berryhill v. Zant, 858 F.2d 633 (11th Cir. 1988); Cervi v. Kemp, 855 F.2d 702 (11th Cir. 1988); Corn v. Kemp, 837 F.2d 1474 (11th Cir. 1988); Godfrey v. Kemp, 836 F.2d 1557 (11th Cir. 1988); Dick v. Kemp, 833 F.2d 1448 (11th Cir. 1987); Bowen v. Kemp, 832 F.2d 546 (11th Cir. 1987) (en banc) (reversing convictions of Charles Bowen and Horace William Dix); Brooks v. Kemp, 809 F.2d 700 (11th Cir. 1987); Thomas v. Kemp, 800 F.2d 1024 (11th Cir. 1986); Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986); Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985); Ruffin v. Kemp, 767 F.2d 748 (11th Cir. 1985); Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) (en banc); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Wallace v. Kemp, 757 F.2d 1102 (11th Cir. 1985); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985); Morgan v. Zant, 743 F.2d 775 (11th Cir. 1984); Strickland v Francis, 738 F.2d 1542 (11th Cir. 1984); Goodwin v Balkcom, 684 F.2d 794 (11th Cir. 1982); Young v. Kemp, 677 F.2d 792 (11th Cir. 1982); Buttrum v. Black, 721 F. Supp. 1268 (N.D. Ga. 1989), aff'd per curiam, 908 F.2d 695 (1990); Jones v. Kemp, 706 F. Supp. 1534 (N.D. Ga. 1989); Smith v. Zant, 664 F. Supp. 500 (M.D. Ga. 1987), aff'd by equally divided court, 887 F.2d 1407 (11th Cir. 1989); Johnson v. Kemp, 615 F. Supp. 355 (S.D. Ga. 1985), aff'd per curiam, 781 F.2d 1482 (1986).

[22] Follow-up research on the defendants whose cases are cited in n. 21 above show that three were wrongly convicted, see Wallace v. State, 188 Ga. App. 77 (317 SE2d 914) (1988) (acquitted of murder at second trial); Special Update: Georgia's Death Row, ATLANTA CONST., Nov. 17, 1996 at G8 (Gary Nelson was released after state withheld exculpatory

has previously recognized that due process may require appointment of counsel in circumstances where the risk of an erroneous decision is not nearly so great as in death penalty litigation: in proceedings to terminate parental rights,[23] adjudicate juvenile delinquency,[24] transfer prisoners to a

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information and did not retry him; Henry Arthur Drake was resentenced to life, but was released when it was learned that the state's main witness had lied). None of the others are currently under a death sentence. See Young v. Kemp, 760 F.2d 1097 (11th Cir. 1985) (en banc), (state barred from seeking death penalty in retrial); Brooks v. State, 262 Ga. 187 (415 SE2d 903) (1992) (following second trial in which the state sought the death penalty, he received a life sentence); see also Special Update: Georgia's Death Row, ATLANTA CONST., Nov. 17, 1996 at G8 (Victor Vernard Roberts and Eddie Lee Ross pled guilty and received life sentences; Walter Curry pled guilty and received a sentence of life without parole; David Alfred Jarrell's second death sentenced was reversed, see Jarrell v. State, 261 Ga. 880 (413 SE2d 710) (1992), and he pled guilty and promised not to seek parole; Tony Amadeo pled guilty and was sentenced to life after this Court reversed refusal to appoint previous counsel for retrial, Amadeo v. State, 259 Ga. 469 (384 SE2d 181) (1989); Janice Buttrum pled guilty and promised not to seek parole; Alphonso Morgan faced a second sentencing trial, see Morgan v. State, 257 Ga. 596 (361 SE2d 793) (1987), but was re-sentenced to life); Kenneth Hardy, John Michael Davis, Jimmie Burden, Jimmy Lee Horton, James Cunningham, Michael Gene Berryhill, Michael Albert Cervi, Charles Corn, Robert Franklin Godfrey, Dennis Dick, Charles Bowen, Horace William Dix, Donald Wayne Thomas, Joseph Wilson, Jr., Judson Ruffin, Joseph James Blake, Shirley Tyler, Robert William Strickland, William Alvin Smith and Johnny L. Johnson were resentenced to life; Bobby Gene Gaddis awaits resentencing following the 1981 vacating of the death penalty; Billy Sunday Birt, Norman Darnell Baxter, Carzell Moore, and Brandon Jones await resentencing); Retrial like a 'reunion' in Cobb, ATLANTA CONST., Feb. 22, 1999 at B1 (Floyd Ernest Hill was released after state could not find reliable witnesses to retry case). Whether Terry Lee Goodwin and Joseph Edward Thomas have been retried and sentenced is unclear; whether Gary Michael Floyd, Roland Paul Hamilton, and Wilburn Wiley Dobbs have been resentenced is unclear.

[23] Lassiter v. Department of Social Servs., 452 U.S. 18 (101 SC 2153, 68 LE2d 640) (1981).

[24] In re Gault, 387 U.S. 1, 41 (87 SC 1428, 18 LE2d 527) (1967).

state mental hospital,[25] and revoke parole,[26] and to misdemeanor criminal trials where even one day of imprisonment is imposed.[27]

In determining the requirements of "fundamental fairness," another relevant inquiry is the contemporary practice.[28] The federal government[29] and all other states provide a right to counsel in capital post-conviction proceedings.[30] Georgia is the only jurisdiction that fails to provide a right to counsel in capital post-conviction cases.[31] While it is true that the mechanism for appointed counsel in capital habeas proceedings usually has come about through the state legislature, this fact is irrelevant for constitutional analysis. If, as the majority concedes, contemporary practice

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[25] Vitek v. Jones, 445 U.S. 480, 496-497 (100 SC 1254, 63 LE2d 552) (1980).

[26] Gagnon v. Scarpelli, 411 U.S. 778, 791 (93 SC 1756, 36 LE2d 656) (1973).

[27] Argersinger v. Hamlin, 407 U.S. 25, 37 (92 SC 2006, 32 LE2d 530) (1972).

[28] See Cooper v Oklahoma, 517 U.S. 348 (116 SC 1373, 1380, 134 LE2d 498) (1996).

[29] 21 U.S.C. § 848(q)(4)(B).

[30] The Spangenberg Group, An Updated Analysis of the Right to Counsel and the Right to Compensation and Expenses in State Post-Conviction Death Penalty Cases," (American Bar Association Post-Conviction Penalty Representation Project, June 1996).

[31] Id. As of the date of the Spangenberg Group report, Wyoming also failed to provide counsel for death penalty inmates in post-conviction proceedings. However, Wyoming recently changed its law and now death penalty inmates are entitled to representation by the Wyoming state public defender in post-conviction proceedings. SEA 41, 55th Leg., 1999 Session (Wyo.) (to be codified at Wyo. Stat. Ann. § 7-6-104(c)(ii) (1999).

is relevant to determining the *constitutional* requirements, then there is no rational basis for distinguishing the source.[32] The fact that other state legislatures have provided for counsel in capital postconviction proceedings may be a strong policy consideration for Georgia's legislature, but it is a weak excuse for this Court to evade its responsibility to ensure the guarantees of the constitution.

The ultimate consideration and the one that underlies all these arguments is that death is different. Its finality as punishment demands special consideration.[33] The majority's response to the reality that "death is different" is to focus on the facts of this case and make the subjective determination that Gibson deserves the death penalty. That decision is never appropriate for this Court to make; it is the province of the jury. Even if it were an appropriate determination for this Court, it cannot justify the denial of due process. The majority's subjective conclusion that Gibson deserves the death penalty ignores the tenet that "fundamental fairness is the central concern of the writ of habeas corpus."[34] When a petitioner is on death row and pursuing his first habeas petition, there can be no glimmer of hope that fundamental fairness will prevail in the absence of counsel and, without a procedure for appointed counsel, the right to meaningful

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[32] Cooper, 116 SC at 1380 (In considering constitutionality of procedural rule, Court surveyed contemporary practice set forth in case law and statutes of the various states).

[33] Ake v. Oklahoma, 470 U.S. 68, 87 (105 SC 1087, 84 LE2d 53) (1985) (Burger, C.J., concurring) ("In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases."); California v. Ramos, 463 U.S. 992, 998-999 (103 SC 3446, 77 LE2d 1171) (1983) ("qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.").

[34] Strickland v. Washington, 466 U.S. 668, 697 (104 SC 2052, 80 LE2d 674) (1984).

access to habeas review under the Georgia Constitution is lost.

For all these reasons, I conclude that meaningful access to the right to seek habeas relief and fundamental fairness in those proceedings demand appointment of counsel for Gibson and I would reverse and would order a new habeas hearing following appointment of counsel.

Because the Court has not granted the certificate for probable cause to appeal, nor given the parties the courtesy of an opportunity to submit briefs on the alleged constitutional errors during the trial, I further believe that it is inappropriate to consider those issues as the Court does in division 2.

I am authorized to state that Chief Justice Benham and Justice Sears join in this dissent.

S97R1412. GIBSON v. TURPIN, WARDEN.

SEARS, Justice, dissenting.

I fully concur with the dissent. The official taking of a human life is the ultimate governmental exercise of control and power over individual liberty. If it is to be done, it must be done cautiously, dispassionately, soberly, and fairly. And fundamental fairness demands that a condemned prisoner have the benefit of competent counsel to articulate his constitutional claims and to navigate the procedural and substantive morass that is our habeas corpus law. If this were not so, all states but one that impose the death penalty would not require counsel in these cases. Nevertheless, the majority today joins that one state and requires a condemned man, without counsel, to bring his claims for relief in an arcane process that he can not possibly understand in a court of law that (most likely) will not be able to understand his constitutional concerns. This is an outcome that no just government should countenance. I am authorized to state that Chief Justice Benham and Presiding Justice Fletcher join in this dissent.

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

EXZAVIOUS LEE GIBSON,	*	
EF 261140,	*	
	*	CIVIL ACTION NO.
Petitioner,	*	95-V-648
	*	
v.	*	
	*	
ALBERT G. THOMAS, WARDEN,	*	
HABEAS CORPUS	*	
	*	
Respondent.	*	

FINAL ORDER

This is a habeas corpus case in which Petitioner, Exzavious Lee Gibson, is challenging his conviction and death sentence for malice murder. This case came before this Court for an evidentiary hearing on September 12, 1996. After careful consideration of the pleadings, evidence, and argument in this matter, this Court hereby ORDERS that habeas corpus relief be and is hereby DENIED.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner was indicted in the Superior Court of Dodge County, Eastman, Georgia, on February 20, 1990, for the February 2, 1990 malice murder and armed robbery of Douglas Coley. (R. 1). Petitioner was represented pre-trial, at trial, and on appeal by attorney W. Dennis Mullis of Cochran, Georgia. The trial in Petitioner's case was conducted June 11 through 14, 1991. On June 13, 1991, the

jury returned a verdict finding Petitioner guilty of malice murder and armed robbery. (R. 1). Following the sentencing phase of trial, the jury found the existence of two statutory aggravating circumstances, (1) that the offense of murder was committed while Petitioner was engaged in the commission of another capital felony, to wit: armed robbery, and (2) that the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved an aggravated battery to the victim. (R. 4). The jury recommended the sentence of death, (R. 4), and Petitioner was sentenced to death for malice murder. (R. 5). Petitioner received a sentence of life imprisonment for armed robbery. (R. 7).

Petitioner's motion for new trial was filed on June 21, 1990, heard on December 17, 1990, and denied on January 4, 1991. (R. 195-197; 201). Petitioner filed a timely notice of appeal, and after briefing and oral argument, the Georgia Supreme Court affirmed Petitioner's convictions and sentences on June 10, 1991. Gibson v. State, 251 Ga. 313, 404 S.E. 2d 781 (1991).

In its opinion on direct appeal, the Georgia Supreme Court found the facts of Petitioner's case as follows:

> The victim operated a family-owned grocery store in Eastman. Late in the afternoon of February 2, 1990, Eastman's chief of police, driving by the store during a routine patrol, saw a crowd at the front entrance. A man ran to the chief's car and reported there was blood all over the store and no one visible inside. The chief radioed for assistance and then approached the store. The main entrance was locked. A member of the victim's family broke open a side door. The police chief entered the store and discovered the victim's

body "behind the counter and blood just totally everywhere."

A man had been seen running away from the store. One of the women in the crowd recognized him and knew where lived. She accompanied a police officer to the defendant's home. Leaving her in the car, the police officer went to the door, knocked, and asked permission to enter. A woman answered, telling the officer to come in. He opened the door and immediately noticed drops of fresh blood on the floor in the living room. The officer asked the woman if anyone had run into the house. She answered "her grandson" and directed him to a bedroom down the hall. The officer went to the bedroom. Looking from the doorway, he saw bloody money under the bed. The officer went to the bed and looked under it, saw the rest of the money (almost $500) and a wallet. He looked inside the wallet and determined that it belonged to the victim. Looking around, he saw some bloody clothes near a closet which fit the description of the clothing worn by the man seen running away from the store. The officer opened the closet door and found the defendant, "crouched down" and sweating profusely. He was arrested and taken to jail.

An autopsy was conducted on the body of the victim. He had been cut numerous times; some of the cuts were very deep while others were shallow. The autopsist testified that he found 39 "stab and slash and superficial cut wounds on (the victim's) body." The knife blade had broken off in the vertebrae of the

> victim's neck, severing the victim's spinal cord and immediately paralyzing him from the neck down. In the autopsist's opinion, many of the superficial wounds in the front of the victim's chest and neck were inflicted by what was left of the knife after it had broken in the victim's neck.
>
> The defendant confessed shortly after he was arrested. He first gave a written statement in which he acknowledged killing the victim, claiming he needed money for drugs. Later that evening, he gave a longer tape-recorded statement, in which he added that he had been in the store earlier that day and had used profanity in the presence of the victim, who had then lectured him about his behavior. The defendant stated that when he returned later, he intended not only to rob the victim but also "to hurt him" because "I didn't like him."

Gibson, 261 Ga. at 313-314.

The United States Supreme Court denied certiorari on February 24, 1992. Gibson v. Georgia, 502 U.S. 1101, 112 S. Ct. 1188 (1992) reh. denied 503 U.S. 999, 112 S.Ct. 1708 (1992).

On December 20, 1995, with no pending execution date, Petitioner filed a pro se state habeas corpus petition which had been prepared by the Georgia Appellate Practice and Resource Center on Petitioner's behalf, (Attachment to Petition, p.1).

No amendments to the petition were filed, and this Court scheduled an evidentiary hearing for September 12, 1996 on the claims Petitioner raised in his original petition.

At this hearing, Petitioner appeared pro se, (T. 1), and refused to go forward with his case. (T. 2-3). It is clear to this Court, given Petitioner's demeanor and his statements at the evidentiary hearing, that Petitioner made a conscious choice not to proceed with his case at the evidentiary hearing. (T. 1, 2, 3, 4, 16, 29, 38, 60, 62, 64, 65, 67, 69, 70). As discussed below, Petitioner is not entitled to counsel in this collateral, civil, habeas corpus proceeding; therefore, this Court proceeded with the evidentiary hearing.

It is well-established that there is no federal constitutional right to counsel for indigent petitioners in a capital habeas corpus proceeding. Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990 (1987), held that there is no constitutional right to appointed counsel in state post-conviction proceedings under the Sixth Amendment or the Due Process or Equal Protection guarantees of the Fourteenth Amendment. Murray v. Giarratano, 491 U.S. 1, 109 S. Ct. 2765 (1989), applied the rule of Pennsylvania v. Finely to state post-conviction challenges by death-sentenced inmates and rejected any distinction, for Pennsylvania v. Finley purposes, between capital and non-capital state post-conviction challenges under the Eight Amendment, the Due Process Clause, or the "right of access" concept of Bounds v. Smith, 420 U.S. 817, 97 S.Ct. 1491 (1977).

It is equally well-established that there is no state constitutional right to counsel for indigent petitioners in a capital habeas corpus proceeding. Croker v. Smith, 225 Ga. 529, 169 S.E. 2d 787 (1969), held that there is no right to counsel under the state constitution, Art. I, Sec. I, Para. XIV, because habeas corpus is not a criminal proceeding. McClure v. Hopper, 234 Ga. 45, 214 S.E.2d 503 (1975), recognized that any provision of counsel for habeas corpus proceedings would be the province of the legislature. Stephens v. Balkcom, 245 Ga. 492, 265 S.E.2d 569 (1980), confirmed that there is no state or federal right to counsel in state habeas corpus proceedings. The Court in

McCorquodale v. Stynchcombe, 239 Ga. 138, 236 S.E.2d 486 (1977), reasoned that because there is no state or federal constitutional right to counsel in a state habeas corpus proceeding, as a habeas corpus is not a criminal proceeding, the constitutional right to effective assistance of counsel does not apply to death penalty state habeas corpus proceedings. Finally, the Court in State of Georgia v. Davis, 246 Ga. 200, 269 S.E.2d 461 (1980), reaffirmed that indigent habeas petitioners are not entitled to appointed counsel, confirming that this holding applies equally to death-sentenced habeas corpus petitioners, and rejecting a claim that death-sentenced inmates are entitled to appointed counsel under either the "right to meaningful access" concept of Bounds, 430 U.S. 817, or because of the "irrevocability of death." Davis v. Thomas, 266 Ga. 835, 471 S.E.2d 202 (1996), recently reaffirmed this body of precedent, acknowledging, in the context of a death penalty habeas corpus proceeding, that the constitutional right of effective assistance of counsel does not apply in habeas corpus proceedings and that there is no right to appointment of counsel in habeas corpus proceedings.

Petitioner Gibson received the assistance of counsel during the entire course of his criminal proceedings as was his constitutional entitlement. Moreover, Petitioner's criminal proceedings progressed through a statutory framework legislatively designed to minimize the occurrence of any error in his death penalty trial. Unified Appeal Proceeding (UAP); O.C.G.A. § 17-10-36. Petitioner was also provided mandatory appellate review of his death sentence, O.C.G.A. § 17-10-35, although such review is not constitutionally required. See, e.g., Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871 (1984).

Petitioner, like all death-sentenced inmates in Georgia, was tried under Georgia's UAP which applies to any Georgia death penalty case during pretrial, trial, motion for new trial, and direct appeal proceedings. The UAP

utilizes a "checklist" of legal issues as a means of avoiding or promptly correcting error in order "to make certain that all possible matters which could be raised in defense have been considered by the defendant and defense counsel and either asserted in a timely and correct manner or waived in accordance with applicable legal requirements. . . ." O.C.G.A. § 17-10-36; UAP § I. Interim appellate review of pretrial rulings is contemplated under the UAP, and any issue ruled on in such review is res judicata and the law of the case. UAP § II (D-F). The express purpose of the UAP is "to insure that as many issues as possible which heretofore could be raised by writ of habeas corpus or other post-trial procedure were timely raised before or during trial." UAP § IV (2).

Petitioner received the appellate review which is statutorily-mandated for all Georgia death penalty convictions. O.C.G.A. § 17-10-35; Patillo v. State, 258 Ga. 255, 368 S.E. 2d 492 (1988).

During his pretrial, trial, motion for new trial, and direct appeal proceedings under the UAP, Petitioner enjoyed a constitutional and statutory entitlement to counsel. See, e.g., Williams v. Turpin, 87 F.2d 1204, 1210 (11th Cir. 1996).

Given the express emphasis placed on criminal trial and direct appeal proceedings, and in light of the constitutional framework discussed above, the Georgia General Assembly recognized the appropriate, collateral, role of the state habeas corpus proceedings. By statute, and as recognized in subsequent caselaw, the scope of habeas corpus proceedings has been narrowly defined, and the issues which can properly be addressed are limited. See, e.g. O.C.G.A. § 9-14-40 et seq.; Black v. Hardin, 255 Ga. 239, 336 S.E.2d 754 (1985); Gunter v. Hickman, 256 Ga. 315, 348 S.E. 644 (1986); Valenzuela v. Newsome, 253 Ga. 793, 325 S.E. 2d 370 (1985) (quoting Wainwright v. Sikes, 433

U.S. 391 (1977) in discussing "cause" and "prejudice" rule as having "the salutary effect of making the state trial on the merits the 'main even," so to speak, rather than a 'tryout for the road'"). As noted by Justice Harlan, "Habeas corpus has always been a collateral remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review." Mackey v. United States, 401 U.S. 667, 682, 91 S. Ct. 1160, 1175 (1971) (opinion concurring in judgments on part and dissenting in part) (emphasis in original) quoted in Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 1073 (1989). "[D]irect appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception." Barefoot v. Estelle, 463 U.S. 88, 887, 103 S.Ct. 3383, 3391 (1982).

Since Petitioner is not entitled to the appointment of counsel in his collateral, civil, capital habeas corpus proceeding under either the federal or the state constitutions, and since the Georgia General Assembly has deliberately concentrated the State's resources at the trial and direct appeal stages of Georgia death penalty cases, and since the separation of powers doctrine forbids the entry of the judiciary into the legislative realm of government, this Court cannot invade the province of the legislature by appointing counsel to Petitioner to represent him in these habeas corpus proceedings.

CLAIMS NOT RAISED AT TRIAL AND/OR ON APPEAL ARE PROCEDURALLY DEFAULTED AND ARE PRECLUDED FROM REVIEW BY THIS COURT

Petitioner alleges the following claims as grounds for habeas corpus relief, each of which is procedurally defaulted:

(1) that the prosecution made allegedly prejudicial remarks during its opening statement, in violation of Petitioner's rights to due process and a fair trial under Art.

I, Sect. I, Paras. 1, 11, and 17 of the state constitution and 5th, 6th, 8th and 14th Amendments to the federal constitution;

(2) that the prosecution engaged in allegedly improper and highly prejudicial argument during its guilt/innocence phase closing argument, in violation of Petitioner's rights to due process and a fair trial;

(3) that the prosecution engaged in allegedly improper and prejudicial argument during its sentencing phase closing argument, in violation of Petitioner's rights to due process and a fair trial under Art. I, Sec. I, Paras. 1, 11, and 17 of the state constitution and 6th, 8th and 14th Amendments to the federal constitution;

(4) that the prosecution allegedly failed to disclose to Petitioner evidence allegedly in its possession which was allegedly "material, and exculpatory or favorable to Petitioner on issues of guilt and/or punishment" in violation of Petitioner's rights under Art. I, Sec. I Paras. 1, 2, 11, and 14 and 17 of the state constitution and 6th, 8th and 14th Amendments to the federal constitution, as set forth in Brady v. Maryland, 373 U.S. 83 (1963);

(5) that the Unified Appeal Procedure (UAP), (O.C.G.A. § 17-10-36), is unconstitutional on its face and as applied to Petitioner's case in violation of Petitioner's rights under Art. I, Sec. I, Paras. 1, 2, 11, 12, 14, and 17 of the state constitution and 5th, 6th, 8th and 14th Amendments to the federal constitution, specifically, due process, an alleged, "right to silence" defined as a "right to be heard through counsel" when represented by counsel, the right to counsel, and equal protection.

FINDINGS OF FACT

This Court finds that these allegations were not raised at trial, if appropriate, and on direct appeal as required by state law.

CONCLUSIONS OF LAW

O.C.G.A. § 9-14-48(d) provides:

> The court shall review the trial record and transcript of proceedings and consider whether the Petitioner made a timely motion or objection or otherwise complied with Georgia Procedural Rules at trial and on appeal and whether, in the event the petitioner had new counsel subsequent to trial, the petitioner raised any claim of ineffectiveness of trial counsel on appeal; and absent a showing of cause for noncompliance with such requirement, and of actual prejudice, habeas corpus relief should not be granted.

O.C.G.A. § 9-14-48 (d).

In interpreting this code section, the Georgia Supreme Court has held, "A failure to enumerate as error on appeal any alleged error or deficiency stands on like footing with a failure to make timely objection in the trial court - - that is, the same shall be waived. Being waived, there then exists a procedural bar to its consideration in habeas corpus proceedings, under the same circumstances as pertain to like waivers in the trial court." Black v. Hardin., 255 Ga. 239, 336 S.E.2d 754 (1985). Under O.C.G.A. § 9-14-48 (d) and the authority of Black v. Hardin, 255 Ga. 239, and

Valenzuela v. Newsome, 253 Ga. 793, 325 S.E.2d 370 (1985), claims not properly raised at trial and on appeal are procedurally defaulted and are precluded from review by this Court on their "merits" absent a showing by Petitioner of cause and actual prejudice sufficient to excuse Petitioner's procedural default of these claims, or of a miscarriage of justice.

To the extent that Petitioner attempts to establish "cause" based on his claim of ineffective assistance of counsel (e.g., Petitioner's ineffective assistance claims of failure to file proper pretrial motions and failure to object to closing argument), this Court holds that because, as addressed below, Petitioner's attorney was not ineffective, this allegation is insufficient to establish "cause" to excuse procedural default. In Devier v. Zant, 3 F. 3d 1445 (11th Cir. 1993), the petitioner in that case made a similar allegation of ineffective assistance of counsel as "cause," which he claimed was sufficient to excuse a procedural default under Georgia law of certain of his claims. Since the reviewing court found that Devier's attorneys "did not render ineffective assistance of counsel at various episodes during the trial and therefore cannot further conclude that the representation was pervasively deficient throughout the trial," the reviewing court found that the petitioner had presented insufficient cause to excuse the procedural default of these claims. Id. at 1454. Similarly, because ineffective assistance of counsel has not been established by petitioner (see infra, for this Court's findings of fact and conclusions of law on Petitioner's claim of ineffective assistance of counsel) his claim of ineffective assistance of counsel cannot provide "cause" for the procedural default of the claims listed above. See also Davis v. Williams, 258 Ga. 552, 553 (1988) (no showing of ineffective assistance of counsel such as to constitute "cause").

With respect to Petitioner's "Brady" claim, Petitioner fails completely to establish "cause" for a failure to have

raised this claim previously. Petitioner fails to identify any "evidence" the state allegedly withheld from Petitioner. Therefore, Petitioner necessarily fails to establish that the could not have presented this claim previously.

Petitioner has not shown cause for the failure to have raised this claims in a timely fashion. Because it is necessary that a petitioner establish both "cause" and "actual prejudice" in order to overcome procedural default, an insufficient showing on one prong obviates the need for examination of the other prong. However, this Court concludes that Petitioner has likewise failed to establish actual prejudice resulting from the failure to have raised these claims in a timely fashion.

Nor is review of these claims warranted to avoid a "miscarriage of justice" in this case, such as "the imprisonment of one who, not only is not guilty of the specific offense for which he is convicted, but, further, is not even culpable in the circumstances under inquiry." Valenzuela, 253 Ga. 796 (emphasis in original) (noting circumstance which might amount to a "miscarriage of justice," as more than mere procedural irregularity or reversible error is contemplated)/ Petitioner's case does not present circumstances amounting to a "miscarriage of justice."

Habeas corpus relief on these grounds is therefore denied.

EFFECTIVENESS OF COUNSEL

Petitioner asserts the following claims of ineffective assistance of counsel: (a) counsel failed to conduct an adequate pre-trial investigation into the State's case and defenses allegedly available to Petitioner; (b) counsel failed to file several unspecified motions pretrial to protect Petitioner's right to a fair trial; (c) counsel failed to conduct

an adequate examination of potential jurors to ensure that Petitioner received a fair and impartial jury and failed to object to the sitting of several unspecified venirepersons who allegedly could not impartially determine Petitioner's guilt or the appropriate punishment in this case; (d) counsel failed to confront adequately the State's case during the guilt phase of trial; (e) counsel failed to object to the admission of several unspecified items of evidence offered by the State during the guilt phase, objection to which would allegedly have resulted in this evidence not being admitted; (f) counsel failed to appropriately object to the allegedly improper closing argument of the prosecution at the conclusion of the guilt phase of trial; (g) counsel failed to give closing argument at the conclusion of the guilt phase which adequately exposed unspecified shortcomings of the State's case against Petitioner; (h) counsel failed to raise proper objections to unspecified allegedly improper charges given by the trial court to the jury at the conclusion of the guilt phase of trial; (i) counsel failed to properly object to unspecified items of allegedly improper evidence offered by the State in aggravation at the penalty phase of trial; (j) counsel failed to conduct an adequate pre-trial investigation into Petitioner's life and background to uncover and present unspecified evidence in mitigation, which Petitioner asserts would have been compelling; (k) counsel failed to object properly to unspecified allegedly misleading and improper arguments made by the prosecution during its penalty phase summation to the jury; (l) counsel failed to object to unspecified portions of the trial court's charge which allegedly failed to adequately define mitigating circumstances and allegedly misled the jury in other ways.

STANDARD FOR JUDGING CLAIMS OF INEFFECTIVE ASSISTANCE

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court adopted a two-pronged test for reviewing ineffective assistance of counsel claims.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

The Supreme Court of Georgia adopted the Strickland standard for judging claims of ineffective assistance of counsel in Smith v. Francis, 253 Ga. 782, 325 S.E.2d 362 (1985), and has articulated that standard as follows: "In order to establish that trial counsel's performance was so defective as to require a new trial, [the defendant] must show that counsel's performance was deficient and that the deficient performance so prejudiced [the defendant] that there is a reasonable likelihood that, absent counsel's errors, the outcome of the trial would have been different." Roberts v. State, 263 Ga, 807, 807-808, 439 S.E.2d 911 (1994). See also Bowley v. State, 261 Ga. 278, 280, 404 S.E.2d 97 (1991).

In reviewing counsel's representation of Petitioner, this Court heeds the principle established in Strickland that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This Court is reminded also that "[t]here are countless ways to provide effective assistance in any given

case. Even the best criminal defense attorneys would not defend a particular client in the same way." Id. at 689. Additionally, this Court is cognizant that "[j]udicial scrutiny of counsel's performance must be highly deferential, " Id., and that

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Id.

In judging claims of ineffective assistance, "counsel" is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. Accord Smith v. Francis, 253 Ga. at 783. See also Zant v. Moon, 264 Ga. 93, 97, 440 S.E.2d 657 (1994). Therefore, in reviewing the claims of ineffective assistance of counsel in the instant case, this Court will, as instructed in Strickland, "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689 (citations omitted) quoted in Bowley, 261 Ga. at 280.

This Court will "judge the reasonableness of counsel's challenged conduct on the particular facts of the case, viewed as of the time of counsel's conduct," Id. at 690, and will not "speculate as to whether a different trial strategy might have been more successful." Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 844 (1993) (quoting Strickland, 466 U.S. at 690).

As the Georgia Supreme Court recognized in Zant v. Moon, the parameters set forth by the United States Supreme Court for considering ineffective assistance claims require a reviewing court to "address not what is prudent or appropriate, but only what is constitutionally compelled." Zant v. Moon, 264 Ga. at 95-96 (quoting Burger v. Kemp, 483 U.S. 776, 780 (1987)). "The object of an ineffectiveness claim is not to grade counsel's performance." Strickland, 466 U.S. at 697.

> The test for reasonable attorney performance "has nothing to with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial."

Jefferson v. Zant, 263 Ga. 316, 318, 431 S.E.2d 110 (1993) (quoting White v. Singletary, 972 F.2d 1218, 1220-1221 (11th Cir. 1992).

The proper focus of a court reviewing a claim of ineffective assistance should be to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 688.

Applying these principles to petitioner's claims of ineffective assistance, i.e., according a strong presumption in favor of effectiveness of Petitioner's counsel; viewing counsel's conduct from his perspective at the time of trial and appeal; presuming the reasonableness of trial strategy; giving recognition to the fact that even the most qualified counsel might represent a capital litigant differently depending, and finally, being aware that event the most experienced and effective attorney might be unable to prevent the imposition of the death penalty in a particular

case, this Court concludes that petitioner has failed to establish that he received ineffective assistance of counsel during either phase of trial or on direct appeal.

Petitioner was represented pretrial, at trial, and on direct appeal by attorney William Dennis Mullis. Mr. Mullis had been in practice in the Dodge County area for eleven years at the time of his representation of Petitioner and represented Petitioner in his capacity as contract public defender for Dodge County and two other counties in the Oconee Judicial Circuit, a position which he had held since the early 1980's and which he continued to hold until 1992. (T. 17-18). At the time of his representation of Petitioner, Mr. Mullis had handled "scores if not hundreds of felonies," including two prior death penalty cases. Mr. Mullis succeeded in securing a reversal on direct appeal of the death sentence in one of the two prior death penalty cases he handled, but that defendant, John Connor, was again sentenced to death at the resentencing trial. (T. 19-20). Mr. Mullis was able to draw on his experience in representing the defendants in the two previous death penalty cases in representing Petitioner in his death penalty trial. (T. 20).

Mr. Mullis met with Petitioner soon after Petitioner's arrest for the crimes in this case and had "many, many meetings" with Petitioner as the case progressed.. (T. 20-21). Petitioner appeared to Mr. Mullis to be rational and cooperative and was able to be helpful to the extent possible given the facts of the case. (T. 21-22). Mr. Mullis discussed with Petitioner the facts of the case, and Petitioner's own version of the events which he related to Mr. Mullis inculpated Petitioner in the crimes. (T. 28-29). Additionally, Petitioner had given two statements to police on the day of the crimes which were largely consistent with the version of events Petitioner related to Mr. Mullis and which also inculpated Petitioner in the armed robbery and stabbing murder of the victim. (T. 30).

Given the facts of the case and Petitioner's account of the crimes to Mr. Mullis, which was consistent with Petitioner's statements to police and which inculpated Petitioner as the perpetrator of the crimes, Petitioner was unable to provide Mr. Mullis with the names of any potential guilt phase defense witnesses. (T. 22). For similar reasons, Mr. Mullis decided not to seek funds from the trial court for an investigator, as Mr. Mullis felt that there was not a need in Petitioner's case given the state of the open file policy adopted by the state, the evidence in the case, and Petitioner's own statements to Mr. Mullis. (T. 26, 27, 55).

Because the state was seeking the death penalty against Petitioner, Mr. Mullis felt that it was appropriate to pursue the issue of Petitioner's mental competency. (T. 32-33). Mr. Mullis therefore petitioned for a mental examination, (R. 55), which the trial court granted. (R. 82). Petitioner was then evaluated by court-appointed psychologist Dr. Storms. Dr. Storms' report found Petitioner to fall within the antisocial continuum, to have engaged in some malingering, to have no psychotic symptoms, and to present no mental competency issues. Dr. Storm's report noted that the only possible mitigating factor presented as a result of his evaluation was that Petitioner's upbringing pointed him in the direction of the development of an antisocial personality disorder. Dr. Storms also noted in his report that Petitioner has a prior criminal history including a charge of theft and assault in Maryland in 1989 and a number of crimes in Florida and that he has been in trouble with the law for the majority of his life. The report also noted that he considered Petitioner to be dangerous and to be a possible escape risk. (R. 95; Resp. Ex. 1).

Mr. Mullis interviewed Dr. Storms by telephone following his evaluation of petitioner. (T. 34-35; Resp. Ex. 2c). Dr. Storms related that Petitioner has been in trouble with the law for most of his lift [sic] and had been institutionalized at institutions the functional equivalent of

Georgia's Youth Development Centers for his problems with the law. Mr. Mullis inquired about any history of child abuse, but Dr. Storms related that no such history had been uncovered. Dr. Storms related the petitioner's IQ has tested somewhere in the 80's and that neurological testing had come back completely negative for any neurological problems. Dr. Storms noted that Petitioner was well outside the range of mental retardation and also noted that Petitioner was "very street smart" and that it is probable that he could have tested higher on general information if he had put forth more effort in school. Dr. Storms also noted during his conversation with Mr. Mullis that Petitioner had not expressed much remorse for the crime. (Resp. Ex. 2c)

Following the court-ordered evaluation conducted by Dr. Storms, Mr. Mullis moved for an independent mental health evaluation by psychologist Dr. George Anderson, whose services Mr. Mullis had used on prior occasions. (5/29/80 T. 19; T. 33). The trial court granted an order for an independent psychological evaluation of Petitioner by Dr. Anderson, (R. 100), and Dr. Anderson evaluated Petitioner. The results of Dr. Anderson's confidential psychological evaluation of Petitioner revealed that Petitioner made little effort in taking the psychological tests administered to him, that he had no prior history of institutionalization for mental problems, that he had been in trouble with the law previously and had spent time in jail in Florida prior to moving to Eastman, Georgia, and that he had been raised by an aunt in Maryland after his mother died when he was two, had lived alone in Florida prior to moving to Eastman, and had finally lived with an aunt in Eastman. (Resp. Ex. 2a).

On the Wechsler Adult Intelligent Scale-Revised, petitioner scored a verbal IQ of 78, a Performance IQ of 76, and a Full Range IQ of 76, placing him in the Borderline Range of intelligence. However, in a telephone interview which Mr. Mullis conducted with Dr. Anderson following his evaluation of Petitioner, Dr. Anderson explained that

Petitioner was brighter than his IQ test scores reflected, that Petitioner had not applied himself while testing, and that Petitioner's IQ score was probably in reality at least 5 or 6 points higher than what he had tested. Dr. Anderson confirmed during the telephone interview that Petitioner was "certainly" and "clearly" not retarded. (Resp. Exs. 2a, 2b). A Wide Range Achievement Test-Revised score showed Petitioner" reading to be of the ninth grade equivalent and his arithmetic to be at the fifth grade equivalent; however Dr. Anderson noted in his report that Petitioner basically quit on the arithmetic section and therefore his score was likely not an accurate reflection of his arithmetic abilities. (Resp. Ex. 2a). A Mini-Mult test showed an exaggeration of symptoms but, to the extent the testing was valid, showed a pattern consistent with individuals who are:

> Depressed, tense, irritable, [ ] distrust people, [ ] keep people at a distance and [ ] have a good deal of hostility. It is common for juvenile delinquents to demonstrate this pattern. Individuals with this pattern are frequently found to be unpredictable and impulsive. They do not develop close relationships with other people and tend to distrust others. The (sic) frequently get into trouble because of their poor judgment and demonstrate some antisocial features. Individuals with this pattern who commit crimes are frequently found to carry out crimes that are poorly planned and poorly executed.

(Resp. Ex. 2a). Dr. Anderson made an Axis II major diagnosis of antisocial personality disorder.

Mr. Mullis felt that neither the evaluation of Petitioner by Dr. Storms nor the evaluation of Petitioner by

Dr. Anderson provided anything particularly beneficial to Petitioner's case. (T. 34-38). (Resp. Exs. 1, 2a 2b, 2c).

Because Petitioner claimed in his first statement to police, given within an hour of the commission of the murder and armed robbery of the victim in this case, that he had smoked crack approximately one hour prior to the crimes. (State's Ex. 7), Mr. Mullis considered the possibility of using Petitioner's claimed drug use as a possible defense to the crimes. However, Mr. Mullis rejected this as a possible defense both because voluntary intoxication is not a defense and because Mr. Mullis' own observations of Petitioner shortly after the arrest and throughout his representation of Petitioner failed to reveal anything consistent with Mr. Mullis' previous observations of defendant's suffering from drug withdrawal or from a sort of organic brain damage resulting from alcohol or drug abuse. Moreover, Petitioner did not relate any history of treatment for drug abuse, neither the court-appointed psychologist nor the independent psychologist uncovered any evidence of prior institutionalizations for drug use, and there seemed to be no evidence other than Petitioner's own anecdotal statements of a drug problem. (T. 38-40).

Additionally, this court notes that Petitioner did not make any mention in his second statement to police of having used drugs prior to the crimes in this case or of committing the crimes in this case in order to secure money to buy drugs. In fact, while Petitioner noted in this second statement that he committed the crimes in order to get money, instead of mentioning drugs in his second statement, Petitioner added that he had been scolded by the victim when he was in the store earlier in the day of the crimes and that he did not like the victim and wanted to hurt him. (State's Ex. 11A).

Mr. Mullis attempted to build on the evidence of a prior altercation or confrontation between Petitioner and the

victim in requesting a voluntary manslaughter instruction at the guilt/innocence phase of trial, although he did not believe this to be a likely verdict in the case given the evidence, (R. 21; 32), But this request was denied. (T. 39).

Mr. Mullis eventually determined as a strategic decision not to present defense testimony in the guilt-innocence phase of the trial, as there was nothing which Mr. Mullis felt would be helpful to Petitioner on the issue of guilt/innocence. (T. 55-56). Mr. Mullis considered but rejected the idea of entering a guilty plea to the crimes and presenting only the sentencing issue to a jury, concluding that there would be no tactical advantage gained from doing so. Mr. Mullis concluded that the state should still be held to its burden to prove guilt beyond a reasonable doubt and also believed that it would be advantageous to Petitioner to create as much of a record as possible to draw from for any possible future appeal in the case in the event of a conviction. (t. 56). With that strategy, Mr. Mullis decided to pursue several issues through motions, and additionally concentrated on cross-examination of state's witnesses at the guilt phase of trial.

Mr. Mullis moved at the first hearing in Petitioner's case for a copy of the indictment and list of witnesses in the case. (3/26/90 T. 4-5; R. 36), and pursuant to that motion, received the information sought, including supplemental witness lists. (T. 24; R. 58; R. 92; R. 98; R. 107).

Mr. Mullis also filed a motion for an in-camera inspection of the district attorney's file and for production of documents seeking disclosure of all exculpatory material, all statements, and reports of statements by Petitioner or witnesses, any offers of or requests for immunity or leniency concerning Petitioner or potential witnesses, and all scientific reports to which Petitioner was entitled. (R. 34). Mr. Mullis received copies of the statements of Petitioner to police, of the autopsy report in the case, and of the crime lab

reports, (T 30; R. 58; 92,98), and interviewed the autopsies, Dr. Kris Sperry prior to trial regarding Dr. Sperry's findings from the autopsy. (T 47-49). Additionally, the state engaged in an open-file policy whereby Mr. Mullis was permitted access to the state's file for inspection. (3/26/90 T. 9-10; 4/3/90 T. 5-6; R. 112). Mr. Mullis examined the district attorney's files and the Georgia Bureau of Investigation file in the case. (T. 22), and as a part of that review, examined the witness statements contained therein. In addition, Mr. Mullis conducted independent interviews of law enforcement personnel involved in Petitioner's case and also interviewed Vicky Jackson, the witness who has observed Petitioner running from the scene of the crimes and directed police to Petitioner's house. (T. 24-25). Finally, the trial court conducted an in-camera inspection of the state's file and thereafter entered an order finding that there be no mitigating or exculpatory evidence within the file. (R. 112).

Mr. Mullis sought to exploit a potential issue then being considered in the appellate courts of Georgia arising from a case out of the same circuit where Petitioner's case was being tried. That issue was the possibility that, pursuant to a subpoena for production of evidence in the possession of state's witnesses, Georgia Bureau of Investigation Crime Lab personnel would be required to produce all background information leading to their findings and conclusions on evidence in petitioner's case. To that end, Mr. Mullis spoke with fellow attorney Wash Larsen, the attorney who was advancing the argument for such production in the case then being considered in the appellate courts, Eason v. State, 194 Ga. App. 678 (1990) in which certiorari had been granted in the Georgia Supreme Court. Mr. Mullis researched the issue and received from Mr. Larson his brief on certiorari to the Georgia Supreme Court and the subpoena used by Mr. Larsen in the Eason case. (T. 49-50; Resp. Ex. 3). Mr. Mullis filed subpoenas for the production of evidence such as those used in the Eason case, (R. 113), and was met, as

he had anticipated, with motions to quash those subpoenas and request for sanctions against him. (T. 49; R. 137-194). Mr. Mullis continued to pursue this issue in Petitioner's case, seeking the background information from eight separate employees of the Georgia Bureau of Investigation Crime Lab, until he felt himself in danger of being held in contempt of court, at which point Mr. Mullis withdrew the subpoenas and determined instead to raise as an issue on any eventual direct appeal in Petitioner's case the assertion of being forced to withdraw the subpoenas, (T. 50).

In the interim between Petitioner's trial and his direct appeal, the Georgia Supreme Court issued its opinion on certiorari in Eason v. State, 260 Ga. 445, 396 S.E.2nd 492 (1990), holding that evidence such as memos, notes, graphs, printouts, and other data which a crime lab analyst relies on to support his or her testimony and opinion during direct examination is discoverable for crime lab witnesses who testify at trial. On appeal in Petitioner's case, however, the Georgia Supreme Court declined to grant any relief to Petitioner, as the only crime lab witness to be subpoenaed who thereafter testified at trial autopsist Dr. Sperry, testified that he had complied with the subpoena issued. Gibson, 261 Ga. at 315-316(6).

Mr. Mullis filed a motion for a pretrial hearing to determine the voluntariness of the signed statement which Petitioner gave to the Dodge County Sheriff on the day of the crimes, within an hour of the crime, and of the video-taped statement which Petitioner gave to law enforcement personnel later that evening. (R. 37; R. 52; R. 98). It was determined that in order to minimize any pretrial publicity which might be engendered through a public hearing on the voluntariness of Petitioner's statements prior to trial, the Jackson v. Denno hearing on the voluntariness of the statements would be held after the jury selection in Petitioner's case. (See, e.g., 4/3/90 T. 6-9; 5/29/90 T. 1-2). In that hearing, it was determined that Petitioner signed a

written waiver prior to giving each of the statements and admitted in each of the statements that he stabbed the victim for money. Petitioner noted in his first statement that he was arrested in his home approximately fifteen minutes after the crimes. Additionally, Petitioner admitted that he brought the murder weapon with him to the store from his home. In each account of the crimes which Petitioner gave to police, Petitioner stated that he simply walked into the store where the victim was standing behind the counter, and, without saying anything to the victim or asking the victim for money, attacked the victim with a knife and "just stabbed him." In his second statement to police, Petitioner said that he had no regrets about the crimes. (Tr. T. 210-238; State's Exs. 7, 11-A). The trial court ruled that both statements were voluntary and admissible but excluded the video-taped version of the second statement from evidence as it depicted Petitioner in handcuffs. (Tr. T. 235-238). Mr. Mullis noted at the habeas corpus evidentiary hearing that the exclusion of the video tape of Petitioner's statement from evidence inured to the benefit of Petitioner because his demeanor as seen on the videotape of the statement would have been very damaging to Petitioner's case. (T. 57).

Mr. Mullis also sought, through a motion to suppress, to have excluded from Petitioner's case physical evidence linking Petitioner to the crimes. (R. 65). When police, directed by witness Vickie Jackson, followed Petitioner to the home of his relative Addie Johnson (referred to as Petitioner's grandmother and as his aunt) at 804 Leitch Street, immediately following the crimes, police observed in plain view fresh blood on the floor of the residence leading to the back bedroom where Petitioner was discovered hiding in the closet, sweating profusely. Police also observed bloody money under the edge of a bed in the bedroom where Petitioner was hiding, the victim's wallet containing identification of the victim, bloody clothing matching the description of clothing Petitioner was wearing when observed in the vicinity of the victim's store prior to

the commission of the crimes in this case and sweaty, bloody clothing matching the description of clothing worn by a subject fleeing the scene of the crimes, including a pair of black Reebok tennis shoes. Police also found a bloody washrag in the bathroom of the residence. (Tr. T. 177-2-202). At the scene of the crime, police recovered a bloody rag, the knife used to kill shopkeeper Douglas Coley, the blade of which was broken off in the victim's back and the handle and remaining portion of which was found lying next to the victim's body, and bloody shoeprints. Mr. Mullis moved to suppress this evidence, (R. 65), and a hearing was held on that motion. (Tr. T. 175-209), 222-227). The trial court denied Petitioner's motion to suppress, finding that Petitioner's relative Addie Johnson had consented to the entry of the police into her home, that police were in lawful pursuit of Petitioner when they entered the home, that the items of evidence viewed by police once in the home were in plain view. The trial court also relied on the fact that Petitioner subsequently signed consent forms to search his bedroom and seize evidence therefrom and that police obtained a valid search warrant pursuant to which they secured blood samples and fingerprint and palm print samples from petitioner. (Tr. T. 234-235).

Among his efforts relating to the choice of a jury in Petitioner's case, Mr. Mullis, on March 27, 1990, filed a motion for change of venue to be ruled on following voir dire. (R. 39). Thereafter, on April 16, 1990, Mr. Mullis filed a second motion for change of venue, asserting that because of pretrial publicity in the case, it would be impossible for Petitioner to get a fair trial in Dodge County. (R. 87). Mr. Mullis believed that because Eastman is a small town and the victim was well-known in the community through operating the family-owned convenience store in Eastman which the scene of the crimes, and because of pretrial news coverage of the case, a motion for change of venue was appropriate. (T. 42-43). Mr. Mullis presented in support for his April 16, 1990 motion for change of venue

three local newspaper articles on the crimes and on Petitioner. (5/22/90 T. 10-13). The trial court denied the motion at that time but deferred final ruling until after voir dire; however, following voir dire, the court ruled to deny a venue change in Petitioner's case. (Tr. T. 157-158).

In a related effort to secure an untainted jury for Petitioner's trial, Mr. Mullis moved to exclude the news media from pretrial motions hearings or to have said hearings held in chambers. (R. 62). This motion, however, was also denied by the trial court. (5/29/90 T. 1-5).

Focusing on the voir dire itself, Mr. Mullis filed a motion for individually sequestered voir dire, (R. 42), a motion for an order requiring that jury questionnaires be sent to potential jurors, (R. 69), a motion to prohibit the district attorney from asking statutory voir dire questions of prospective jurors, (R. 75), a motion to put each individual juror to a reverse-Witherspoon question, (R. 109), and a motion for a sentencing phase voir dire to proceed the penalty phase of trial if Petitioner was found guilty during the guilt/innocence phase of trial. (R. 79). The trial court granted Petitioner's motion to submit juror information questionnaires to the prospective jurors, and a four-page juror questionnaire was sent to all prospective jurors. (R. 102). In addition to the information gained as a result of the juror questionnaires, Mr. Mullis had a personal familiarity with the local population as much of his general practice came out of Dodge County. Mr. Mullis also asked others about the potential jurors. (T. 43-44). The trial court denied Appellant's motion for an individual sequestered voir dire, opting instead to voir dire the potential jurors in panels; however, the trial court informed Mr. Mullis that it would reconsider that ruling if it appeared that the voir dire of the potential jurors by panels was insufficient. (Tr. T. 10). The jurors were asked, in panels, the "reverse-Witherspoon question." Additionally, the trial court, and not the district attorney, posed the statutory voir dire questions to the jurors.

(Tr. T. 13-156). As the jurors in Petitioner's case were voir died prior to being placed on the petit jury in Petitioner's case regarding whether they could consider both life imprisonment and the death sentence and not automatically vote for a death sentence if Petitioner were found guilty, no separate voir dire between the guilt/innocence phase and the sentencing phase of Petitioner's trial occurred. Mr. Mullis saw no problem with the racial composition of the jury eventually struck in Petitioner's case or with the use of the prosecution's peremptory strikes. (T. 44-45).

During the guilt-innocence phase of trial, Mr. Mullis elicited on cross-examination from the victim's son admissions that he had seen no weapon on Petitioner when he observed Petitioner outside of the family grocery store prior to the crimes in this case, that he had not seen Petitioner enter or exit the store, and that Petitioner had not appeared to the victim's son to be behaving suspiciously outside of the store. (Tr. T. 259-262).

Mr. Mullis was able to call into question the integrity of the crime scene evidence through cross-examination of the police chief who happened upon the scene while driving by. This witness admitted on cross-examination by Mr. Mullis that the front door of the store had been unlocked for a time after the perpetrator left the store and the arrival of the police chief, that the police chief was not the first person to enter the scene, and that at least one other person had been inside the store after the incident but before police arrived. (Tr. T. 271-274).

Mr. Mullis cast further suspicion on the conduct of police in the case with an admission on cross-examination of police officer Taylor that he had failed to get the name of an alleged witness to the perpetrator's flight and had not attempted to secure that information later. (Tr. T. 290-293).

Finally, Mr. Mullis secured an admission by the autopsist Dr. Sperry on cross-examination that the doctor had told Mr. Mullis differently that he had testified on direct examination when Mr. Mullis interviewed the doctor about his findings prior to trial. The implication of the doctor's testimony on direct examination at trial was that the victim had been stabbed with the broken knife after the tip of the knife had broken off in a wound to the victim's neck. The doctor was forced to admit that he had told Mr. Mullis previously that it was possible that the wound to the victim's neck, where a portion of the knife blade broke off, was the final wound to the victim and that it was in fact possible that no wounds were inflicted on the victim after this wound to the victim's neck. (Tr. T. 344-349). Mr. Mullis believed this issue to be particularly important for sentencing purposes. (T. 47-49).

Mr. Mullis attempted to utilize in mitigation during the sentencing phase of trial Petitioner's claims that he had used crack cocaine prior to the crimes in this case and committed the crimes in this case because he needed money for more drugs and that the victim in this case had engaged in a confrontation with Petitioner. This information was presented through the testimony of Petitioner himself. Mr. Mullis direct examination of Petitioner elicited from Petitioner the factors underlying his commission of the crimes, specifically his state of mind as being influenced by drug use on the day of the crime, his drug-induced drive to get more money so that he could buy more drugs, and an altercation between Petitioner and Mr. Coley leading to Petitioner's sudden stabbing of Mr. Coley. Petitioner also testified as to his remorse and revealed that he was only seventeen at the time of the crimes. (Tr. T. 430-437).

As part of his mitigation strategy, Mr. Mullis attempted to provide the jury with reasons to return a verdict of life imprisonment instead of the death penalty against Petitioner. For example, in preparing Petitioner to testify in

mitigation, Mr. Mullis conveyed to Petitioner the importance of providing the jury with a reason that Petitioner's life should be spared. (T. 57). Mr. Mullis was aware that Petitioner had had problems with the law, including problems in Maryland and Florida prior to coming to Eastman, Georgia, and Mr. Mullis was aware that Petitioner had also been charged in Eastman with the commission of a robbery alleged to have been committed the day before the crimes in the instant case. (T. 59; Resp. Exs. 2a, 2b, 2c). Mr. Mullis evaluated this evidence of Petitioner's prior trouble with the law to have no mitigating value and in fact to have potential aggravating value and therefore directed his efforts towards keeping any such information regarding Petitioner's prior criminal troubles out of the jury's consideration in the case. Mr. Mullis also felt that such information would have been inconsistent with the picture the defense wanted to present to the jury of Petitioner as a young man deserving of the jury's mercy. (T. 52, 59-60).

Mr. Mullis was also aware of an escape attempt by Petitioner while incarcerated awaiting trial on the crimes in the instant case. (T. 60). Evidence of that escape attempt in the form of a letter written by Petitioner to jail personnel bragging about his escape plan and of drawings made by Petitioner on the envelope containing the letter was introduced by the state in aggravation at sentencing. (State's Ex. 58; Resp. Ex. 4). Mr. Mullis objected to the introduction of this evidence, claiming the escape attempt was irrelevant to sentencing issues and injected an unindicted crime into the case; however, the trial court admitted the evidence. Mr. Mullis had expected the evidence would come in and had, in fact, discussed with Petitioner the fact that the state would probably present that evidence in aggravation at sentencing. (T. 62).

In order to mitigate any adverse effect which the evidence of the escape attempt might have on the jurors, Mr. Mullis attempted through Petitioner's testimony to establish

that Petitioner had not actually sought to escape incarceration completely out of desire to abscond, but was merely trying to get away from the stark and lonely circumstances present in the Eastman City Jail lockup. (T. 63-64; Tr. T. 435-436).

Petitioner provided Mr. Mullis with the names of family members and acquaintances as potential mitigation witnesses, (T. 22), and Mr. Mullis attempted to emphasis to the jury Petitioner's youth and his lack of a strong home life and his upbringing and family circumstances resulting in Petitioner being "from pillar to post all of his life." (T. 52). Mr. Mullis was aware that Petitioner's mother had been deceased since Petitioner was two years old, herself the victim of a homicide, and that Petitioner's father had had no role in Petitioner's upbringing. (T. 53-54). Mr. Mullis presented that information about Petitioner's biological parents as mitigating evidence. (T. 54, Tr. T. 417-419).

Mr. Mullis decided to present in mitigation the testimony of Minnie Faustine Christopher, Petitioner's aunt, who had raised him in Maryland from the time of this mother's death until he moved to Florida shortly before coming to Eastman, Georgia. Mr. Mullis spoke as well to Petitioner's aunt in Florida, LuLu Jackson, and to Petitioner's aunt or grandmother in Eastman, Georgia, Addie Johnson. However, Mr. Mullis decided to proceed with mitigation testimony only from Faustine Christopher as, in Mr. Mullis' dealings with Petitioner's relatives, Ms. Christopher was the relative who took the most interest in Petitioner and his situation. (T. 53-54).

Mr. Mullis considered a claim by Petitioner to Mr. Mullis that Ms. Christopher had "abused" him. However, this "abuse" appeared to have been at most an overuse of corporal punishment in disciplining Petitioner, and Mr. Mullis was unable to substantiate any abuse in Petitioner's childhood through other family members or through

Petitioner's own accounts of his childhood. For instance, Petitioner never related any history of the authorities becoming involved in Petitioner's homelife with Ms. Christopher. (T. 57-58). Mr. Mullis rejected the idea of having Petitioner testify to this claim not believing it to be productive in terms of their mitigation case. (T. 59).

In addition to the testimony of Ms. Christopher and of Petitioner himself, Mr. Mullis also presented the testimony of Sharon Lumpkin Jordan, who had known Petitioner since his move to Eastman, and who was able to testify that her impression of Petitioner was that Petitioner had always appeared quiet, well-mannered, and polite and have never appeared angry or violent or to be using drugs. (Tr. T. 427-429).

On cross-examination of Petitioner, the state posed a question of Petitioner mentioning experts that say the effects of crack cocaine last approximately fifteen minutes, (T. 437), and Mr. Mullis objected, and the state withdrew the question. Mr. Mullis then moved for a mistrial, but the trial court denied that motion, instructing the jury to disregard anything they had heard in that question and instructing the jury that it should have no bearing in the jurors minds on the decision to be made.

Mr. Mullis' closing argument in mitigation emphasized Petitioner's age, arguing that while the crimes committed by Petitioner were bad, a sentence less than death could have the effect of punishing Petitioner and of reforming him, arguing that in even ten years, Petitioner would be mature enough not to commit such a crime. Mr. Mullis also argued that the Christian response to a crime such as Petitioner's was not retribution and "an eye for an eye" but rather, the teachings of Jesus of forgiveness and letting him who is without sin cast the first stone. Mr. Mullis concluded his closing argument with a recognition that

Petitioner must be punished but "begging" the jury to save Petitioner's life. (Tr. T. 461-463).

On appeal, Mr. Mullis relied on his own recollections of the trial, reviewed the trial transcript for possible error, gave consideration to the applicable case law, and discussed the case and the potential appeal with Petitioner. Petitioner had no particular issues which he wanted to see raised on appeal, (T. 66-67), and Mr. Mullis focused on rulings on motions which the defense had made and no potential trial court error. On appeal, Mr. Mullis alleged error in the trial court's failure to grant Petitioner's motion for change of venue; the trial court's failure to grant Petitioner's motion to require the state to submit their requests to charge at least twenty-four hours prior to trial; the trial court's failure to grant Petitioner's motion to exclude the media from pretrial hearings; the trial court's failure to suppress items of evidence seized from Petitioner's residence; the circumstances resulting in the defense feeling compelled to withdraw their subpoenas for state crime lab information; the trial court's failure to grant a mistrial after testimony by a police officer concerning an alleged spontaneous statement by Petitioner's grandmother, Addie Johnson, during the police entry into Ms. Johnson's home; the trial court's error in admission of certain evidence specifically, photographs of the victim's body; the trial court's admission of the "escape attempt" letter by Petitioner at the sentencing phase of trial; the trial court's denial of a mistrial following the state's reference to opinions of expert witnesses not presented at trial; the trial court's instructions to the jury on mitigating circumstances; and the allegedly excessive and disproportionate nature of the sentence of death imposed on Petitioner. (Appellant's Brief and Enumeration of Error).

In the instant case, Mr. Mullis performed with reasonable effectiveness in representing Petitioner. As the Eleventh Circuit stated in Waters v. Thomas, 46 F.3d 1506 (11th Cir. 1995), "The test for ineffectiveness is not whether

counsel could have done more; perfection is not required." Waters v. Thomas, 46 F.3d at 1518 (quoting Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir. 1992) ("Trial counsel did enough. A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance.")). Mr. Mullis made strategic decisions regarding where to focus the defense efforts, what motions to file, what investigation to make and pursue, and what witnesses to call.

> The strategy [the petitioner's] counsel chose did not work, but that does not establish that it was an unreasonable one. See, e.g., Fleming v. Kemp, 748 F.2d 1435, 1452 (11th Cir. 1984) ("A defense attorney is not ineffective soley because his client is sentenced to death."), cert. denied, 475 U.S. 1058, 106 S.Ct. 1286, 89 L.Ed.2d 593 (1986); Alvord v. Wainwright, 725 F.2d 1282, 1289 n. 12 (11th Cir.) ("[Trial counsel]) cannot be faulted simply because he did not succeed."), modified, 731 F.2d 1486, cert. denied, 469 U.S. 956, 105 S.Ct. 355, 82 L.Ed.2d 291 (1984); Romero v. Lynaugh, 884 F.2d 871, 877 (5th Cir. 1989) ("Had the jury returned a life sentence the strategy might well have been seen as a brilliant move. That it did not does not mean that it was outside the range of reasonable professional assistance."), cert. denied, 494 U.S. 1012, 110 S.Ct. 1311, 108 L.Ed.2d 487 (1990).

Waters, 46 F.3d at 1522-1523.

> Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess. See Solomon v. Kemp, 735 F.2d 395, 404 (11th Cir. 1984) ("While attorneys may disagree as to how many or what particular witnesses to call, such is the stuff out

of which trials are made."), cert. denied, 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 952 (1985).

Waters, 46 F.3d at 1512.

Moreover, as the Eleventh Circuit has reiterated on many occasions, "The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." Cape v. Francis, 741 F.2d 1287, 1301 (11th Cir. 1984) quoted in Waters v. Thomas, 46 F.3d 1506, 1513-1514 (11th Cir. 1995); Atkins v. Singletary, 965 F.2d at 960; Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987).

Mr. Mullis made a reasonable assessment, given the evidence in this case, to focus on motions and not to present guilt-innocence phase evidence. Given the findings made by the psychologists in this case of anti-social personality disorder, it was reasonable not to pursue a mental health defense or mitigation strategy. Likewise, it was reasonable, from Mr. Mullis perspective at the time, not to pursue a drug-based defense or mitigation strategy. The investigation conducted by Mr. Mullis was reasonable given the findings of the psychologists regarding Petitioner's background and history and the information provided to Mr. Mullis by Petitioner himself, and the decision to focus on Petitioner's youth and the circumstances of his rearing through the testimony of Ms. Christopher and Petitioner was likewise reasonable.

"Counsel makes a reasonable strategic decision to present less than all possible available evidence in mitigation." Mitchell v. Kemp, 762 F.2d 886, 899 (11th Cir. 1985) quoting Stanley v. Zant, 697 F.2d 955, 965 (11th Cir. 1983). In Jackson v. Herring, 42 F.3d 1350 (11th Cir. 1995), the Eleventh Circuit noted, "In order for counsel to make a professionally reasonable decision whether or not to present

certain mitigating evidence -- in this case any mitigating evidence -- that counsel must be informed of the available options." Id. at 1366. The Court explained, "although counsel need not 'investigate every evidentiary lead,' he must gather enough knowledge of the potential mitigation evidence to arrive an 'informed judgment' in making that decision." Id. (citing Harris v. Dugger, 874 F.2d 756, 763 (11th Cir.), cert. denied, 493 U.S. 1011 (1989)).

In defining the standard in Strickland for judging the reasonableness of an attorney's decision regarding the scope of an investigation, the United States Supreme Court held:

> "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.

Strickland, 466 U.S. at 690-691.

The Court then instructed that a reasonableness assessment of a decision not to investigate must take into account "all the circumstances," including information supplied by the defendant, and must apply "a heavy measure of deference to counsel's judgments." Id. at 691.

The Eleventh Circuit applied this Strickland standard to evaluate a habeas corpus claim by a death-sentenced inmate in Rogers v. Zant, 13 F.3d 384 (11th Cir. 1994), that his counsel were ineffective for failing to present evidence and argument about the petitioner's drug use when they had not investigated the drug's psychological and behavioral effects on users. The Eleventh Circuit rejected as incorrect the district court's apparent conclusion that "'thorough investigation' must precede all strategic decisions or the decision will probably be ineffective in the constitutional

sense." Rogers, 13 F.3d at 387 (emphasis in original). In doing so, the Eleventh Circuit noted the United States Supreme Court's recognition in Strickland that effective counsel may "make a reasonable decision that makes particular investigations unnecessary." Id. at 386 (quoting Strickland, 466 U.S. at 690-691).

In deciding that counsel acted reasonably in Rogers in declining to investigate further the issue of the petitioner's drug use for purposes of guilt or sentencing, the Eleventh Circuit instructed:

> By its nature, "strategy" can include a decision not to investigate. Strickland indicated clearly that the ineffectiveness question turns on whether the decision not to make a particular investigation was reasonable. 466 U.S. at 691, 104 S.Ct. at 2066. This correct approach toward investigation reflects the reality that lawyers do not enjoy the benefit of endless time, energy or financial resources. See Atkins, 965 F.2d at 959-60 (noting that "[a]t some point, a trial lawyer has done enough," and that "[a] lawyer can almost always do something more in every case"); Gates v. Zant, 863 F.2d 1492, 1498 (11th Cir. 1989) (as long as decision was reasonable under circumstances, counsel may forego line of defense without first investigating it substantially).

Rogers. 13 F.2d at 387.

In this case this Court concludes that Mr. Mullis had sufficient evidence to make an informed decision as to what investigation to pursue and that his decision not to pursue other investigation was therefore reasonable. Mr. Mullis' strategy decisions regarding the investigation to pursue and the evidence to present in this case fell within the range of competent assistance and were not "so patently unreasonable that no competent attorney would have chosen it." Adams v.

Wainright, 709 F.2d 1443, 1445 (11th Cir. 1983) (citations omitted).

Similarly, decisions such as what evidence to present and what objections to make are at their core strategy decisions. While Petitioner has not alleged in the instant case any specifics as to what objections he believes should have been made which were not made or what evidence should have been made which were not made or what evidence should have been presented which was not presented, this Court has not in its review of the record uncovered any error by counsel requiring a finding of ineffective assistance of counsel.

> A jury trial is, by its nature, an enterprise that is filled with imponderables from the viewpoint of a trial lawyer. It is an undertaking that calls not only on the lawyer's head, but also on his [or her] heart and nerve. At times in the trial arena, audacity or imagination or patience accomplish more than pure logic might suggest is possible. The true is that it is often hard for even a good lawyer to know what to do. Trying cases is no exact science. And, as a result, we must never delude ourselves that the fair review of a trial lawyer's judgment and performance is an activity that allows for great precision or for a categorical approach. When reviewing whether an attorney is ineffective, courts "should always presume strongly that counsel's performance was reasonable and adequate" Atkins v. Singletary, 965 F.2d 952, 958, (11th Cir. 1992). And "a court should be highly deferential to those choices . . . that are arguably dictated by a reasonable trial strategy." Devier v. Zant, 3 F.3d 1445, 1450 (11th Cir. 1993).
>
> Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown

> that no reasonable lawyer, in the circumstances, would have done so. This burden, which is petitioner's to bear, is and is supposed to be a heavy one. And, "[w]e are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial . . . worked adequately." See White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992). Therefore, the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between.

Rogers v. Zant, 13 F.3d at 386.

"Even assuming the existence of judgmental and tactical errors, such errors do not always equate ineffective assistance of counsel." Bonds v. State, 203 Ga. App. 51, 54, 416 S.E.2d 329 (1992).

Moreover, in the instant case, this Court does not find prejudice from any possible errors by counsel. The evidence in this case established that Petitioner came to the Coley family grocery store on the day of the crimes armed with a knife which he had brought with him from his home, that he "cased" the store, waiting until it was empty to enter, that he engaged in subterfuge to accomplish his watch on the store, and that he, by his own admission, entered the store to rob the victim but without even asking the victim to turn over the money, approached the victim upon entering the store and attacked the victim with the murder weapon, stabbing the victim thirty-nine times, with so much force that the knife blade used in the attack eventually broke off in the victim's neck.

Habeas corpus relief on Petitioner's claim of ineffective assistance of counsel is denied.

CONCLUSION

After considering all of Petitioner's allegations made in the habeas corpus petition and at the habeas corpus hearing, this Court concludes that Petitioner has failed to carry his burden of proof in demonstrating any denial of his constitutional rights as set forth above.

WHEREFORE, it is hereby ORDERED that the petition for a writ of habeas corpus be denied and that Petitioner be remanded to the custody of Respondent.

If Petitioner desires to appeal this Order, Petitioner must file a written application for a certificate of probable cause to appeal with the Clerk of the Supreme Court of Georgia within 30 days from the entry of this Order and also file a notice of appeal with the Clerk of the Superior Court of Butts County.

The Clerk of the Superior Court of Butts County shall mail a copy of this order to Petitioner, Respondent, the Resource Center, as amicus curiae, and the Office of the Attorney General for the State of Georgia.

SO ORDERED this the 6th day of March, 1997.

/s/ J. Carlisle Overstreet
J. CARLISLE OVERSTREET, Judge
Superior Court of Butts County
Sitting by Designation

Prepared by:

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SUPREME COURT OF GEORGIA

Case No. S97R1412 Atlanta, April 09, 1999

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

EXZAVIOUS LEE GIBSON v. TONY G. TURPIN, WARDEN

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Benham, C.J., Fletcher, P.J., and Sears, J., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk.

28 U.S.C.A. § 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the

meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously

discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during

Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

28 U.S.C.A. § 2244

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted

by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the

court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post- conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Georgia Uniform Superior Court Rule 44

Rule 44. Habeas corpus proceedings in death sentence cases.

44.1. Application
This rule shall apply to all petitions seeking, for the first time, a writ of habeas corpus in state court proceedings for those cases in which the petitioner has received a sentence of death. OCGA 9-14-47.1.

44.2. Request for judicial assignment
Within ten days of the filing of such a petition, the superior court clerk of the county where the petition is filed shall serve a copy of the petition upon the Executive Director of the Council of Superior Court Judges of Georgia. This service may be effected by mail and will constitute a request for judicial assistance under OCGA 15-1-9.1 (b) (3).

44.3. Respondent's answer or motion to dismiss
The respondent shall answer or move to dismiss the petition within 20 days after the filing of the petition or within such further time as the court may set for good cause shown.

44.4. Assignment of judge for habeas corpus proceedings
(A) The Executive Committee of the Council of Superior Court Judges shall promulgate guidelines for the assignment of such cases to the various superior court judges throughout Georgia, and shall provide that the case will not be assigned to a judge within the circuit in which the sentence was imposed. Within 30 days after the Executive Director receives the petition, the president of the council shall assign the case to a judge in accordance with the guidelines.
(B) Pending assignment of a judge, or during a later vacancy of an assigned judge, a presiding judge of the court in which the petition is filed shall be authorized to act on emergency matters unless otherwise disqualified by Uniform

Superior Court Rule 25.

44.5. Preliminary conference and scheduling
The assigned judge may wish to consider scheduling a preliminary conference with counsel for the petitioner and respondent as soon as practical. This conference may be conducted by telephone. The court may also wish to enter a scheduling order establishing specific dates in accordance with the guidelines set forth in this rule. The court may on its own or on motion of either party shorten any time period set forth hereinafter, and may extend such time period for good cause.

44.6. Motions
Within 60 days after the filing of the petition, the petitioner may file pretrial motions. Within 90 days after the filing of the petition, the respondent may file any motions. Responses to motions shall be governed by Rule 6.2.

44.7. Amendments to the petition; discovery
No later than 120 days after the filing of the petition, the petitioner may amend the petition, and if discovery is allowed pursuant to OCGA 9-14-48 it shall be completed.

44.8. Pretrial conference
The court may wish to schedule a pretrial conference with counsel for the petitioner and the respondent and enter an appropriate pretrial order for proceedings in the case. This conference may be conducted with counsel only and by telephone if appropriate.

44.9. Evidentiary hearing
Within 180 days after the filing of the petition, the court shall conduct an evidentiary hearing as provided by OCGA 9-14-47 and 9-14-48.

44.10. Preparation of transcript

The evidentiary hearing shall be transcribed by a court reporter designated by the court hearing the case as set forth in OCGA 9-14-50. Within 30 days after the evidentiary hearing, the transcript of the evidentiary hearing shall be made available to the parties and the court.

44.11. Briefing
Within 60 days after the evidentiary hearing, the petitioner may file any brief and if so directed by the court shall file proposed findings of fact and conclusions of law and a proposed order. Within 90 days after the evidentiary hearing, the respondent may file any responsive brief and if so directed by the court shall file proposed findings of fact and conclusions of law and a proposed order. Within 100 days after the evidentiary hearing, the petitioner may file any additional responsive brief.

44.12. Ruling on petition
Within 90 days of the filing of the respondent's brief, or the petitioner's reply brief if one is filed, the court shall issue its ruling on the petition and its written findings of fact and conclusions of law as required by OCGA 9-14-49.

44.13. Effect of rule
Upon application of any party, the Supreme Court may order such relief as it finds necessary to assure compliance with this Rule. This Rule provides procedural guidelines and no substantive rights are hereby conferred upon any person. No violation of this Rule shall be the basis of any grant of habeas corpus relief.

732 So. 2d 187 (Miss. 1999)

Supreme Court of Mississippi.

Decided:
January 28, 1999

No. 98-DR-00708-SCT. JACKSON v. STATE OF MISSISSIPPI.

ON MOTION FOR REHEARING ON MOTION FOR APPOINTMENT OF COUNSEL AND PAYMENT OF REASONABLE LITIGATION EXPENSES

McRAE, Justice, for the Court:

P 1. The original opinion is withdrawn, and this opinion is substituted therefor. Henry Curtis Jackson, Jr. seeks to have the State provide attorney compensation and reasonable litigation expenses in his attempt to seek post-conviction relief pursuant to Miss.Code Ann. § (1994), et seq. for his conviction and death sentence. This Court has previously denied all motions in other capital cases requesting similar relief. See Lockett v. State, 614 So.2d 888 (Miss.1992). Over the years, it has become apparent that the system is flawed. Valuable time and resources are being wasted in finding representation for death row inmates seeking post-conviction relief, especially since all remedies available under the UPCCRA must be exhausted before federal habeas relief may be sought. We find at this time that recognition of the nature of death penalty litigation in the courts of this state, coupled with the ultimate penalty the State seeks to impose, requires that the motion be granted, that counsel be appointed, and that reasonable expenses of litigation be allowed.

I.

P 2. Henry Curtis Jackson, Jr. was convicted of capital murder and sentenced to death in the stabbing deaths of four nieces and nephews in Leflore County Circuit Court in 1991. See Jackson v. State, 684 So.2d 1213 (Miss. 1996). Jackson was represented by Johnnie Walls at trial and on direct appeal. After Jackson's conviction and death sentence were affirmed by this Court, Walls failed to file a petition for rehearing on behalf of his client within the allotted time and never moved to withdraw from representing him. Jackson's execution was set for August 21, 1996.

P 3. On August 6, 1996, another attorney, C. Jackson Williams, [FN1] filed on behalf of Jackson, in this Court, an Entry of Appearance as Jackson's attorney, Motion for Stay of Execution and Application for Leave to File Out of Time Petition for Rehearing and/or for Recall of the Mandate. Jackson's execution was stayed by this Court and the petition for rehearing was filed, considered and denied. A petition for writ of certiorari was filed in the United States Supreme Court March 5 1997, and denied May 12, 1997. Jackson's execution was then reset by this Court for, and was stayed by the United States District Court on. Williams filed Jackson's Application for Post-Conviction Relief in this Court on May 8, 1998.

P 4. Williams has now filed in this Court on behalf of Jackson a Motion for Appointment of Counsel and Payment of Reasonable Litigation Expenses. Williams states that he has raised in the Application issues "that require paid expert assistance and investigation in order to be adequately addressed" and that if supplied with funds he would hire a forensic psychologist or psychiatrist to review the mental evaluations performed on Jackson before his trial to determine whether insanity was a viable defense, which could lead to a claim of ineffective assistance of counsel. See

Jackson, 684 So.2d at 1226 (Jackson abandoned insanity defense during guilt phase of trial). Williams finally asks that this Court "appoint, compensate, and pay reasonable litigation expenses of the undersigned, including the expenses of a forensic psychologist and a forensic psychiatrist, to prepare and file a petition for Post-Conviction Relief on his behalf." This Court ordered that the State respond to the motion, and that response has been filed and considered. We find that Jackson's motion should be granted.

II.

P 5. A judgment of conviction and sentence of death shall be subject to automatic review by this Court. See Miss.Code Ann. § 99-19-101(4)(1994); § 99-19-105 (Supp.1997). The Constitution of Mississippi requires appointment of counsel pursuant to that automatic review. See also Miss.Code Ann. § 99-15-15 (1994). Where the conviction and sentence of death are affirmed by this Court, the appellant may then file a petition for writ of certiorari with the United States Supreme Court to have it review the conviction and sentence.

P 6. Assuming relief is sought and denied in the United States Supreme Court, the appellant may then apply to this Court for relief under the Uniform Post-Conviction Collateral Relief Act, Miss.Code Ann. § 99-39-1 to -29 (1994)("UPCCRA"). The purpose of the Act is to revise, streamline and clarify the rules and statutes pertaining to post-conviction collateral relief law and procedures, to resolve any conflicts therein and to provide the courts of this state with an exclusive and uniform procedure for the collateral review of convictions and sentences. Specifically, this chapter repeals the statutory writ of error coram nobis, supersedes Rule 8.07 of the Mississippi Uniform Criminal Rules of Circuit Court Practice and abolishes the common law writs relating to post-conviction collateral relief,

including by way of illustration but not limitation, error coram nobis, error coram vobis, and post-conviction habeas corpus, as well as statutory post-conviction habeas corpus. The relief formerly accorded by such writs may be obtained by an appropriate motion under this chapter. Miss.Code Ann. § 99-39-3(1)(1994). The Act provides "a procedure, limited in nature, to review those objections, defenses, claims, questions, issues or errors which in practical reality could not be or should not have been raised at trial or on direct appeal." Miss.Code Ann. § 99-39-3(2)(1994).

P 7. Where a conviction and sentence have been appealed to this Court and affirmed, or the appeal dismissed, an application under the UPCCRA must be filed in this Court. Miss.Code Ann. § 99-39-7 (1994). This Court may grant or deny any or all relief requested in the application or allow the filing of the motion in the trial court. § 99-39-27(7)(a) & (b)(Supp.1997). The trial court then reviews the motion and any response and determines if the motion should be dismissed or if an evidentiary hearing should be held. Miss.Code Ann. § 99-39-19(1)(1994). "If an evidentiary hearing is required the judge may appoint counsel for a petitioner who qualifies for the appointment of counsel under section 99-15-15, Mississippi Code of 1972." Miss.Code Ann. § 99-39-23(1)(1994)(emphasis added). Nothing in the UPCCRA requires that one seeking relief be furnished counsel, either at the trial level or on appeal. See also Harris v. State, 704 So.2d 1286 (Miss.1997)(defendant not entitled to appointed counsel on further discretionary review after direct appeal decided by Court of Appeals).

P 8. The writ of habeas corpus has been a hallmark in the protection of our individual freedoms since being brought to this country by our forefathers from England. It is a civil action brought to test the legalities of confinement and to enforce the civil right of personal liberty. The writ is usually brought by a person who is the subject of a criminal prosecution to enforce his right of liberty. In following the

tradition of habeas corpus practice, the Legislature further stated that an application for post-conviction relief "shall be filed as an original civil action in the trial court, except in cases in which the prisoner's conviction and sentence have been appealed to the supreme court of Mississippi and there affirmed or the appeal dismissed." Miss.Code Ann. § 99-39-7(1994). Though this Court treats this statutory classification with respect, it is obvious that actions under the UPCCRA, which collaterally attack criminal convictions, are a unique kind of civil action. See Johnson v. State, 623 So.2d 265 (Miss.1993)(claimant appealing from denial of post-conviction relief may proceed in forma pauperis in contrast to other civil appeals). The reality is that post-conviction efforts, though collateral, have become an appendage, or part, of the death penalty appeal process at the state level. The importance of state post-conviction remedies is heightened by the requirement that, with few exceptions, state remedies must be exhausted before relief can be sought through federal habeas corpus. See 28 U.S.C. § 2254(b) (1994); Coleman v. Thompson, 501 U.S. 722, 731, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

P 9. Certain issues must often be deferred until the post-conviction stage, such as the claim of ineffective assistance of counsel. Our practice has been, in recent appeals, to deny appellate counsel leave to withdraw from capital cases which have reached the post-conviction stage unless the appellant agrees to proceed pro se or substitute counsel may be found. Obtaining qualified substitute counsel willing to proceed pro bono on this type of specialized, complex and time-consuming litigation is almost impossible. This practice ignores the reality that the state post-conviction stage is particularly important in capital cases, and that having the same counsel represent the condemned in appellate proceedings and post-conviction actions prevents counsel from raising the claim of ineffective assistance of trial or appellate counsel at the post-conviction stage. This

practice also ignores the reality that indigent death row inmates are simply not able, on their own, to competently engage in this type of litigation. Applications for post-conviction relief often raise issues which require investigation, analysis and presentation of facts outside the appellate record. The inmate is confined, unable to investigate, and often without training in the law or the mental ability to comprehend the requirements of the UPCCRA. The inmate is in effect denied meaningful access to the courts by lack of funds for this state-provided remedy.

P 10. Though not a criminal case, the United States Supreme Court has recognized that this Court could not deny access to the state appeal process because of lack of funds where a fundamental right was involved in civil litigation. In M.L.B. v. S.L.J., 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996), the Supreme Court found that this Court could not dismiss an appeal due to the appellant's failure to pay the appeal costs in a civil case where the issue at stake was termination of the appellant's parental rights. "[W]e place decrees forever terminating parental rights in the category of cases in which the State may not 'bolt the door to equal justice.' " M.L.B., 117 S.Ct. at 568. Access to equal justice is an even greater interest where the State seeks to impose the penalty of death.

P 11. In Murray v. Giarratano, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989), Chief Justice Rehnquist, joined by three other justices, found that there was no constitutional right to counsel, provided by the state, in post-conviction proceedings. Justice Kennedy concurred in the judgment, saying that "no prisoner on death row in Virginia has been unable to obtain counsel to represent him in post-conviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for post-conviction relief. I am not prepared to say that this scheme violates the Constitution." Murray, 492 U.S. at 14-15, 109

S.Ct. 2765. In Mississippi, repeatedly, since 1995, death row inmates have been unable to obtain counsel or requisite help from institutional lawyers. The Legislature has been aware of this acute problem. In the 1998 session, it took the first step toward the institution of a statewide public defender system. It is strongly urged that the Legislature proceed toward a solution to this serious problem by enacting the program utilized in Virginia or some other system. We can no longer sit idly by. We therefore grant the motion.

III.

P 12. In summary, we find that Henry Curtis Jackson, Jr., as an indigent, is deprived of assistance of counsel and access to the court system in his attempt to obtain state post-conviction relief from his conviction and sentence. We further find that in capital cases, state post-conviction efforts, though collateral, have become part of the death penalty appeal process at the state level. We therefore find that Jackson, as a death row inmate, is entitled to appointed and compensated counsel to represent him in his state post-conviction efforts. This matter is remanded to the Leflore County Circuit Court for appointment of counsel for Jackson and consideration of reasonable litigation expenses. Whether appointed counsel may receive litigation expenses in part to hire a forensic psychiatrist or psychologist depends on the nature of the request, and rests in the discretion of the circuit court.

P 13. MOTION FOR APPOINTMENT OF COUNSEL AND PAYMENT OF REASONABLE LITIGATION EXPENSES GRANTED. REMANDED TO THE LEFLORE COUNTY CIRCUIT COURT FOR APPOINTMENT OF COUNSEL FOR HENRY CURTIS JACKSON, JR., AND CONSIDERATION OF REASONABLE LITIGATION EXPENSES.

PRATHER, C.J., SULLIVAN and PITTMAN, P.JJ., and BANKS, J., CONCUR.

MILLS, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY JAMES L.ROBERTS, Jr., and WALLER, JJ. SMITH, J., NOT PARTICIPATING.

MILLS, Justice, specially concurring:

P 14. Representation by counsel in pre-conviction capital proceedings is a fundamental right of the accused guaranteed by this nation's constitutional jurisprudence. See Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). This right has not been extended to post-conviction relief proceedings. See Murray v. Giarratano, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989). The majority errs by stating, without authority, that such a right is found in the Mississippi Constitution of 1890. A right to counsel in post-conviction relief proceedings can be found in neither the Eighth Amendment of the United States Constitution nor the Due Process clauses of the Federal or State Constitutions. Such a post-trial right is constitutionally nonexistent and beyond our judicial ken to legislate on this matter. However, Miss.Code Ann. § 99-15-15 (1994) requires that " ... such representation [is] available at every critical stage of the proceeding against him where a substantial right may be affected." Though the statute does not define the term "critical", layman's logic dictates the conclusion that proceedings to test the validity vel non of trial court orders of execution are critical. I would find simply that post-conviction proceedings undertaken pursuant to Miss.Code Ann. § 99-39-5 constitute a critical stage in the proceedings in capital felony cases and therefore counsel should be provided.

P 15. I would limit the majority opinion to the issue before us, that being whether an indigent defendant on death

row is entitled to counsel when filing post conviction relief actions. I would find this to be a critical stage of the proceedings and would require appointment of counsel, whether paid for by the county or the state, before further actions could be taken. I therefore specially concur.

JAMES L. ROBERTS, Jr., and WALLER, JJ., JOIN THIS OPINION.

FN1. By order dated July 1, 1997, Williams was appointed by the United States District Court for the Northern District of Mississippi (Western Division) to represent Jackson in his petition for habeas corpus pursuant to 28 U.S.C. § 2254, only for the purpose of the federal appeal.

Williams also filed Jackson's petition for certiorari with the United States Supreme Court. Johnny Walls, Jackson's trial and appellate attorney, has never filed a motion to withdraw; pursuant to our decision in Harris v. State, 704 So.2d 1286 (1997), his representation was effectively terminated when the decision was handed down.

END OF DOCUMENT

IN THE SUPERIOR COURT
FOR THE COUNTY OF BUTTS

STATE OF GEORGIA

EXZAVIOUS GIBSON,	)	
	)	
PETITONER,	)	
	)	CIVIL ACTION
VERSUS	)	FILE NO.: 95-V-648
	)	
	)	
TONY TURPIN,	)	
	)	
RESPONDENT.	)	

- - -

HABEAS CORPUS HEARING

held before the Honorable J. Carlisle Overstreet

taken by Nancy S. Staulcup, Official Court Reporter

on September 12, 1996, commencing at 10:00 a.m.

at the Jackson State Prison, Jackson, Georgia

- - -

APPEARANCES

ON BEHALF OF MR. GIBSON:

PRO SE

AMICUS CURIAE:

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PROCEEDINGS

THE COURT: Okay. Are you Mr. Gibson?

MR. GIBSON: Yes, sir.

THE COURT: Mr. Gibson, I'm going to ask you, if you would, to speak up because the court reporter is going to have to take everything down we say. My name is Carlisle Overstreet. I'm a Superior Court judge down in Augusta, Georgia in the Augusta Circuit. I was assigned to hear this habeas petition pursuant to the rules set by the Supreme Court and the Council of Superior Court Judges. I'm here today to do that.

Are you represented by counsel?

MR. GIBSON: No, sir.

THE COURT: And you are Ms. Whitaker?

MS. WHITAKER: Yes, sir, that's correct.

THE COURT: And you represent the State?

MS. WHITAKER: Yes, sir, I represent Warden Turpin.

THE COURT: Give me a second and let me look at the file. Ms. Whitaker, I have looked at the petition, of course, the attachment is on the forms that are provided. Does the State have any objection to the petition as to its form?

MS. WHITAKER: No, sir.

THE COURT: Mr. Gibson, as you are aware this is classified as a civil proceeding. Consequently, you have a right to counsel if you want it. If you do not have counsel, the Court does not employ counsel for you. Are you aware of that?

MR. GIBSON: I don't have an attorney.

THE COURT: Okay, sir. I understand that. My understanding is that even though he has filed the petition, the burden is basically upon the State. Is that correct, Ms. Whitaker?

MS. WHITAKER: Your Honor, the burden is on the Petitioner, actually, to show a violation of his constitutional rights.

THE COURT: He has filed the petition. I think that is what he has alleged in his Petition; is that correct?

MS. WHITAKER: Yes, sir.

THE COURT: Okay. Mr. Gibson, do you want to proceed?

MR. GIBSON: I don't have an attorney.

THE COURT: I understand that.

MR. GIBSON: I am not waiving any rights.

THE COURT: I understand that. Do you have any evidence you want to put up?

MR. GIBSON: I don't know what to plead.

THE COURT: Huh?

MR. GIBSON: I don't know what to plead.

THE COURT: I am not asking you to plead to anything, I am just asking you if you have anything you want to put up, anything you want to introduce to this Court.

MR. GIBSON: But, I don't have an attorney.

THE COURT: Yes, sir. Do you have anything you want to tell this Court?

MS. WELLS: Your Honor.

MR. GIBSON: I don't waive any rights.

THE COURT: Yes, ma'am.

MS. WELLS: My name is Elizabeth Wells. I have filed a number of motions in this Court as Amicus Curiae. If I could be heard for a moment.

THE COURT: No, ma'am, have a seat. Mr. Gibson, do you have anything you want to tell this Court?

MR. GIBSON: I don't waive any rights.

THE COURT: Ms. Wells, I have received all of your motions. I have ruled on all of your motions, I believe haven't we?

MS. WHITAKER: Yes, sir, that's correct, as far as I know.

MS. WELLS: Your Honor, I certainly haven't received copies of rulings on a number of those motions.

THE COURT: maybe you ought to check with the clerk. Have you done that?

MS. WELLS: Yes, Your Honor, I have not seen rulings on certainly the last four filed, the last three filed on August 19th. I have seen an entry of an Order for Scheduling Order, is that considered a ruling on these motions?

THE COURT: Yes, ma'am. I think it is. Based upon -- Mr. Gibson, I will be glad to listen to anything you want to tell me, anything you want to say. I judge you have nothing you want to say or nothing you want to tell me. Is that correct? Except what is in your petition.

MR. GIBSON: I don't have an attorney.

THE COURT: I know that. I can see that. Does the State want to tell me anything?

MS. WHITAKER: Your Honor, as I am sure you are aware, and you have stated. There is no right to counsel in a habeas corpus proceeding. But the United States Supreme Court and the Georgia Supreme Court have held that in Pennsylvania v. Finley, 41 U.S. 551 and Stephens Valkcom, that's S-T-E-P-H-E-N-S, V-A-L-K-C-0-M, at 245 Georgia 492 and most recently, the Georgia Supreme Court has reaffirmed that recognition in Davis v. Thomas, a death penalty habeas corpus case at 266 Georgia 835. As the Court is also aware, the Resource Center filed a petition on

Mr. Gibson's behalf in this case and have, as is well noted, filed numerous motions in the case, already. It is the State's position or belief that this is most likely a ploy for an appeal from this habeas corpus proceeding as the pleadings so far filed by the Resource Center as Amicus counsel have threatened that type of an appeal is Petitioner proceeds pro se, but since the State of the law is that he is not entitled to counsel, we are ready to go forward.

THE COURT: All right.

MS. WELLS: Your Honor, those allegations are simply not true.

THE COURT: Ms. Wells, Ms. Wells, Ms. Wells.

MS. WELLS: Yes, Your Honor. I recognize --

THE COURT: Just a minute, please. Just a minute. Would you like to represent Mr. Gibson?

MS. WELLS: Your Honor. If Your Honor is --

THE COURT: Just answer --

MS. WELLS: I'm answering your question.

THE COURT: Just answer yes or no.

MS. WELLS: If you will give us time, the answer is yes.

THE COURT: Do you want to make an appearance for Mr. Gibson?

MS. WELLS: Your Honor --

THE COURT: Let me tell you what's wrong with what you have done.

MS. WELLS: I recognize --

THE COURT: You know, I've been on vacation. I think Ms. Whitaker has been on vacation. You've been on vacation. Mr. Gibson has been in jail. You have had ample opportunity to do anything you wanted to do in this case and have failed to do that. Now, I am not so sure that you are --

are you capable of representing him, if you handle it the way that you have handled it so far.

MS. WELLS: Your Honor --

THE COURT: I have some great concern about that.

MS. WELLS: With our caseload, we are presently not capable of representing Mr. Gibson.

THE COURT: Well, then --

MS. WELLS: We would do it in a heart beat, if we could.

THE COURT: You've had four years to do it.

MS. WELLS: Your Honor, we have requested, over and over and over, to be heard on this and Your Honor has not granted us even an opportunity to be heard on this.

THE COURT: I've read all of your -- what are you going to tell me different than is in your pleadings?

MS. WELLS: Your Honor, I'm going to try to make you see that this is -- that nobody has ever proceeded in a modern death penalty in Georgia without counsel.

THE COURT: I understand that.

MS. WELLS: That this is ridiculous. That Mr. Gibson has a right --

THE COURT: Why didn't you --

MS. WELLS: -- to a writ of a habeas corpus.

THE COURT: You've had four years to represent him. Why didn't you get in here and represent him?

MS. WELLS: We have not had four years to represent him. That's just absolutely ludicrous, Your Honor. That's certainly -- and the records will support that.

THE COURT: You've been in this case. You've had time to go to Europe, haven't you?

MS. WELLS: Absolutely, Your Honor, and --

THE COURT: And yet you didn't have time to represent Mr. Gibson.

MS. WELLS: I don't think those two weeks would have made a difference in whether or not Mr. Gibson's case was properly prepared.

THE COURT: That's --

MS. WELLS: I've worked on this -- if you want to talk about my personal life --

THE COURT: No, I don't want to talk about it, I'm just saying --

MS. WELLS: You apparently do.

THE COURT: I think if you would have put the time on the case maybe you could have represented him, but I have some serious concern that if you think it is more important to do that than to take up this case, whether you could adequately represent him or not.

MS. WELLS: I have worked fourteen hours days for the last two weeks. I have worked almost every weekend since last September, 1995. This is ludicrous to find that because I went to England for two weeks I am waiving Mr. Gibson's right to an attorney.

THE COURT: No, all I am saying

MS. WELLS: He --

THE COURT: All I am saying to you, is that if it is so important for him to have -- that you can't -- for you to get him a lawyer, why didn't you stay here and try to do that?

MS. WELLS: Your Honor, I have attorneys. I have told the Court there are attorneys lined up who will take Mr. Gibson's case if Your Honor will allow him an opportunity to meet with Your Honor and discuss a Scheduling Order prior to the entry of appearance. These attorneys cannot afford to enter an appearance and be ordered to file something within a month.

THE COURT: What does the State want to tell me?

MS. WHITAKER: Your Honor, I would add that under the Uniform Superior Court Rule adopted by the Georgia Supreme Court in January of this year and passed in December of this year, in which the Respondent again believes, was what prompted the filing of this petition in the first place. The time lines provided are that an evidentiary hearing should be held within six months of the filing of the petition. The petition was filed in December of 1995, and as the Court is aware, it has already been nine months, so any, any protestations from the Resource Center that they have not had sufficient time given the case was final in 1992, we believe are inaccuracies at this point.

MS. WELLS: Your Honor, as the State has conceded, this was filed prior to the Rule 44. It's not -- Rule 44 does not dictate the scheduling guidelines in this case. The Georgia Constitution allows Mr. Gibson the writ of habeas corpus, a guaranteed --

THE COURT: Please, Ms. Wells. Ms. Wells, don't repeat anything you've already told me in all of these briefs you've filed. Okay? I mean, I've read them all. I've been through it.

MS. WELLS: Your Honor, this is a complete denial of due process. This is making a mockery of the system.

THE COURT: You've argued that point. You've argued that point.

MS. WELLS: Your Honor, I submit if you would have allowed the hearing back when we filed the first Amicus motion, we may be proceeding on this. We cannot -- we are understaffed. We have two attorneys at the Georgia Resource Center who can enter into State Court.

THE COURT: Well, the record reflects what times have been spent doing what. It reflects the time that the petition has been filed; how long everything has been pending. Ms. Wells, in all due respect, the thing has had adequate time to be thoroughly investigated and reviewed, if you wanted to do that.

MS. WELLS: Your Honor, that is simply not true.

THE COURT: With all due respect.

Ms. WELLS: That is simply not true.

THE COURT: Well, then what do you think is a good time -- years?

MS. WELLS: No, Your Honor, I will tell you what. Various courts -- there were thirteen pro se petitions there were thirteen inmates proceeding pro se in January of this year. Various courts have allowed counsel on them. They have had scheduling orders. One Judge allowed nine months; one Judge allowed six months. The Resource Center has been willing to meet with these Courts to attempt to find counsel or to enter an appearance. We have repeatedly told the Court that that's our desire to do so in Mr. Gibson's case. We don't think that the system benefits by having this inmate go through without counsel. We think that it makes a mockery of the system. We --

THE COURT: Didn't I ask you yesterday, didn't I ask you yesterday on the telephone, did you want to represent him?

MS. WELLS: Your Honor, and I have told you --

THE COURT: And what did you tell me?

MS. WELLS: -- we will represent him with time.

THE COURT: Yes.

MS. WELLS: I said with adequate time --

THE COURT: Well, let me ask you this, did I ask you that back when you first filed your amicus brief, did you want to represent him?

MS. WELLS: No, Your Honor.

THE COURT: What did you tell me then?

MS. WELLS: No, Your Honor, you did not tell me that.

THE COURT: Well, what have you told me in your briefs?

MS. WELLS: I have asked -- I have requested time so we can come on to represent this client. I have requested repeatedly that we be allowed time to represent this inmate adequately. We are bound by ethical rules to competently represent someone.

THE COURT: Do you want to step up here and have a seat next to him as his lawyer?

MS. WELLS: Your Honor, if you will give time. I mean it is ludicrous to expect a hearing to go forth.

THE COURT: Ms. Wells, Ms. Wells.

MS. WELLS: I haven't read the record in this case. I know nothing about this case.

THE COURT: Ms. Wells, Ms. Wells.

MS. WELLS: Yes, Your Honor.

THE COURT: Do you want to represent him? I am not going to tell you what I am going do, but if you want to represent him, sit down in the chair, make an appearance in this Court or please be seated.

MS. WELLS: Your Honor, you know I want to represent him, I have said it every way I can say it. To sit down here and have the Court say, conduct the hearing when I have never spoken with Mr. Mullis, I have never read the record. I know nothing about this case. That would make a mockery of it. Your Honor, I think --

THE COURT: You have filed a lot of papers not to have read the file.

MS. WELLS: Those papers do nothing but recite the history of the death penalty and what's going on and what our attempts are to find counsel.

THE COURT: I will give you the opportunity right now to have a seat with him as his lawyer or please sit down.

MS. WELLS: Your Honor, I, just to put on the record that I would like to enter an appearance, but I cannot

do so without the Court discussing what the scheduling limitations are going to be.

THE COURT: I am not going to make any deals, Ms. Wells. If you want to represent him, have a seat. If not, sit down.

MS. WELLS: Well, Your Honor, this is a complete denial of Mr. Gibson's rights.

THE COURT: Come up here and help him.

MS. WELLS: Help him what? Help this Court deny him all of his rights?

THE COURT: Don't sit -- all you have done is sit outside the bar and throw stones.

MS. WELLS: Your Honor --

THE COURT: Get inside the bar and do something.

MS. WELLS: Your Honor, the record will show that we have entered appearances on a number cases; that we have found counsel on a number of cases.

THE COURT: Well, I am not in those cases, Ms. Wells, and all I have gotten is stones thrown, and all I am saying is either come up here and represent him, you are welcome come and sit down and represent him, and we will proceed and I will listen to your motions, and I am not going to tell you how I am going to rule on them. I am not going to predecide the case. But if you want to represent him, have a seat. If not, please sit down, and let me go forward.

MS. WELLS: Your Honor, I don't understand why we can't just discuss what a scheduling order would be prior to that. I certainly have no confidence that we won't have to proceed with the hearing today. I can't enter --

THE COURT: Well, let me ask you this --

MS. WELLS: I cannot competently --

THE COURT: If I sit down and discuss the scheduling order and you don't like it then, you ain't going to do anything so, I mean, if you want to represent him, I'll say

it again, have a seat next to him, make an appearance or, please, let me go forward.

MS. WELLS: Your Honor, this is a mockery of justice.

THE COURT: You have told me that.

MS. WELLS: Yes, Your Honor, well, I just don't think you are aware of that.

THE COURT: I am very aware of what --

MS. WELLS: This is ridiculous. Mr. Gibson may as well be hung up from a tree out back. This is just ridiculous.

THE COURT: I judge you are not going to represent him, is that correct?

MS. WELLS: Your Honor, I will enter an entry of appearance if Your Honor will discuss a scheduling order. I simply cannot do it.

THE COURT: I am not going to take --

MS. WELLS: I mean, I am supposed to be in another court.

THE COURT: It would not be fair. It would not be fair to Mr. Gibson to have your make a conditional appearance with him. If this man needs a lawyer, if you think he needs a lawyer, be his lawyer. If you don't, don't, don't say, I am only going to represent him. If he needs a lawyer so bad, don't tell him you are going to represent him only if he does certain things, only if the Courts do certain things. It is not fair to him. Either get in the case or get out.

MS. WELLS: Your Honor, it is not fair to him to come on a case and not be given an opportunity to investigate and present his issues.

THE COURT: It is better than to have some lawyer get in the case and then turn around and desert him, because they don't get what they want.

MS. WELLS: Your Honor, I am not talking about turning around and deserting him. I am talking about not

coming on the case until we-discuss whether or not there is adequate time to investigate and present this case.

THE COURT: I understand your position, and I will again offer you the opportunity to come up here and represent him or please have a seat and let me proceed.

MS. WELLS: Well, Your Honor, I would respectfully submit that that is an empty offer.

THE COURT: Okay. Thank you. Okay. Anything else on behalf of Mr. Gibson? Anything else Mr. Gibson wants to tell me after that conversation?

MR. GIBSON: No, sir.

THE COURT: Okay. Ms. Whitaker, is there anything else you want to tell me? Do you want to proceed?

MS. WHITAKER: Yes, sir, I am ready to proceed. And, Your Honor, initially, I will call Dennis Mullis to the stand.

THE COURT: All right. Come on up, Mr. Mullis. Will your raise your right hand, please, sir? Do you solemnly swear the testimony and evidence you shall give this Court on issues pending, will be truth, the whole truth, so help you God?

MR. MULLIS: I do.

THE COURT: Thank you very much, Mr. Mullis. Have a seat.

MS. WELLS: Your Honor, I apologize for interrupting.

THE COURT: Yes ma'am.

MS. WELLS: Mr. Gibson was not even allowed an ink pen.

THE COURT: Any what?

MS. WELLS: He was not even allowed an ink pen.

THE COURT: Okay. I think we can handle that.

MS. WELLS: This man who is expected to be able to --

MS. WHITAKER: Your Honor, if I may, I will provide Mr. Gibson with an legal pad and a pen.

THE COURT: Thank you. Thank you very much. Go ahead, Ms. Whitaker.

DENNIS MULLLIS

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. WHITAKER:

Q. Mr. Mullis, will you please state your full name for the record?

A. William Dennis Mullis, M-U-L-L-I-S.

Q. Mr. Mullis, what do you do for a living?

A. I am an attorney at law.

Q. And when were you first admitted to practice in Georgia?

A. 1979.

Q. And have you been practicing since that time?

A. I have.

Q. And were you the trial attorney in Mr. Gibson's case?

A. Yes.

Q. Death penalty case?

A. Yes.

Q. Were you also the appellate attorney in his case.

A. Yes.

Q. And did you represent Mr. Gibson at that time in your capacity as a public defender?

A. I did.

Q. And for how many years were you the public defender?

A. Oh, I loose track. I would say that I was public defender for twelve years, I believe, plus or minus.

Q. And are you now in private practice?

A. Yes, I was in private practice at the time that I represented Mr. Gibson.

Q. I am sorry, I had thought that you said you were the appointed public defender at that time?

A. I was. We had a contract or I had -- initially my partner and I had a contract to handle the public defense, indigent defense, for a three county area beginning in the early 1980's, and as I became a solo practitioner, I continued that contract up until 1992, if my memory serves me correctly. And I was in private practice simultaneously.

Q. Now, in your practice prior to the time that you became the contract public defender for the three counties in the circuit that you mentioned, what was the nature of your practice before that time?

A. General private practice. Well, we are only talking about a couple of years, you understand, before I became public defender.

Q. All right. And at the time of your appointment in this case, what was the primary nature of your practice?

A. General practice of law in a small town.

Q. Did you have any particular concentration at that time?

A. No, not really.

Q. All right. What was your background in criminal law at that time?

A. At what time?

Q. At the time that your represented Mr. Gibson?

A. I had, by that point in time, I had handled scores if not hundreds of felonies, misdemeanors of every type and description, that you normally see in a Superior Court setting; two death penalty cases prior to Mr. Gibson's.

Q. And, if you recall, what were those two death penalty cases?

A. Mr. Eli Beck was one defendant and the other was Mr. John Connor; Connor was first actually.

Q. All right. And what was the outcome of the Connor case?

A. Connor received the death sentence.

Q. And the outcome of the Beck case?

A. Beck received a death sentence, initially, at the first trial; was reversed -- the sentencing phase was reversed on appeal. He was tried a second time and received the death penalty again. Subsequently, after my representation, within the last five or six years, the issue of retardation became a issue in this case, and he was allowed to enter an arrangement whereby he received a life sentence.

Q. So when the case was reversed on appeal after the first trial, were you the appellate attorney at that time, too?

A. Throughout, yes, throughout.

Q. Did you find that your previous handling of the two death penalty cases that you have mentioned had any impact on your representation of Mr. Gibson in this case?

A. Well, I think in most every case in life, experience helps. Yes.

Q. All right. And did you do any particular research into death penalty law in preparation for Mr. Gibson's trial?

A. I'm certain that I did.

Q. Do you recall at approximately what stage in the proceedings that you were appointed to represent Mr. Gibson?

A. I can check the dates, if you like, but to the best of my recollection, it was within days of his arrest.

Q. All right. Would the appointment time that you have submitted on your affidavit for payment to the County have reflected the approximate time of your representation, of your appointment?

A. I would think so. I, you know, you are talking about appointment and sometimes appointment comes actually after I have actually first seen the defendant or it might come after I opened my file, you understand.

Q. So you might begin work on the case before you are formally appointed by the Court; is that what you're saying?

A. Correct. When I was public defender, if I got word that we had a major felony in my area, I would beat a path to the jail and see the defendant.

Q. And you believe that may be what happened in this case?

A. I am sure it did.

Q. Now, do you recall approximately how many meetings you had with your client over the course of his representation, your representation of him?

A. No, I do not, there were many, many meetings. He was held, I remember, in the jail in the city jail in Eastman and I can't recall if he ultimately ended up in the county jail or not, but I remember going to see him in the city jail on many occasions.

Q. All right. Now, during those meetings with Mr. Gibson did you have any -- let me rephrase that. What was your impression of his ability to assist you in the case and in his; defense?

A. I felt that Exzavious was quite rational in all of my dealings with him. He was cooperative. Actually, he was not from the Dodge County area and he actually seemed to have, to me, a little bit better education than the typical defendant that I was accustomed to. I always found him to be rational and very helpful to the extent that he could be in his case.

Q. Was he able to discuss with you the facts of the case?

A. Yes.

Q. Was he able to discuss the State's evidence as you all found it?

A. Yes.

Q. And was he able to provide you with any defense witnesses or potential defense witnesses?

A. I remember, not so much in the guilt-innocence phase, but in the mitigation phase, yes, he gave me the names of family members that he felt might be of some assistance or acquaintances.

Q. Now, was there an open file in this case?

A. So far as I know. You know, I --

Q. Let me -- was there an open file policy in this case?

A. To my knowledge, there was. I went to the District Attorney's office and examined the file and examined the GBI file in the case.

Q. And the record reflects that there was an in camera inspection in this case. Was that the typical practice of your circuit in death penalty cases?

A. Certainly.

Q. Did you find the District Attorney's office to be cooperative in providing you information from their file?

A. Yes, yes, as far as I know, again, you know, if it is not there, I would have no way of knowing about it,

unless it come to me from some outside source, but I -- nothing developed during the course of the trial that came as a surprise to me.

Q. Did you file any Brady or discovery type motions in addition to the fact that you had an open file policy with the District Attorney's office in this case?

A. Yes, I did.

Q. And do you recall what those motions were?

A. Well, a Brady motion, of course, and request for scientific reports. This was before the more recent discovery, criminal discovery statute, which I would very much like to have had when I was public defender. That's all I can recall from the top of my head, although I am confident that I did.

Q. Did you receive any discovery as a result of the motions you had filed?

A. Do you mean from the trial court after an in camera inspection?

Q. Either that or from the District Attorney's office?

A. I don't recall anything from the trial court. That would be in the record. I know, I am not aware of receiving anything that was potentially exculpatory, if that's what you mean.

Q. Did you receive the crime lab report in this case and any supplements?

A. I am sure I did.

Q. All right. Do you recall whether you received witness lists?

A. Yes.

Q. And did you receive supplemental witness lists as they were produced?

A. I am sure I did.

Q. All right. Do you recall whether you reviewed any witness statements taken by the District Attorney's office or law enforcement in your review of the D.A.'s files?

A. Again, I read the Georgia Bureau of Investigation report which contained a number of witness statements.

Q. All right. Do you recall whether you interviewed any of the State's witnesses on your own?

A. I recall speaking to some of the law enforcement personnel. And I talked to a young lady who had, I believe, had allegedly seen Mr. Gibson or someone matching his description leaving the scene of-where the homicide occurred. That stands out in my mind.

Q. Would that have been Vickie Jackson that you are referring to, the woman who testified at the motion to suppress hearing?

A. I believe that's right. I, also, spoke to a Kirkpatrick or a Kilpatrick lady, who had perhaps seen Gibson earlier in the day or something. It has been a while.

Q. Can you briefly review for the Court's benefit what the State's evidence showed in this case?

A. Well, the evidence showed that the victim operated a small, privately owned convenience store, there in the city limits of Eastman, and, I believe someone came, a customer came to the store and entered and found it in a state of disarray and found the operator's body behind the counter and blood everywhere.

Law enforcement, I don't believe that -- they were ultimately called, but as it turned out, I believe, the chief of police just happened to be driving by as a number of people converged on the premises and came in and, of course, sealed off the scene. Another witness approached the law enforcement officer and said that she had seen someone that she described leaving the scene shortly before and

appearing to look over his shoulder as if he was very nervous or concerned about what was behind him, and she described this individual and told them where he was staying. The officer went to that location, all of this taking place within minutes of the homicide. The officer went to the location, knocked on the door, the elderly lady that lived there said come in. The officer stepped into the front the room and saw what appeared to be droplets of blood leading to the back room in the house. And, he, the officer said something to the lady to the effect of where's your grandson or is your grandson here, and she said he's in the back room, what's happened, has he robbed somebody or something? And the officer went to the back room. I believe he testified that he observed what appeared to be bloody money or some bloody objects sticking out from under the bedspread. He lifted up the bedspread and found money and a knife, I think. I think, there was a knife found at the scene there. The officer began to look about and couldn't see anybody and observed a closet door -- a closet, closet door. Went over and without calling backup opened the closet door and there was Mr. Gibson and he told Mr. Gibson to come out and he was arrested without any struggle as far as I know.

Q. Did the State's evidence show that there was any description of the person seen leaving the scene which would have matched your client's description?

A. Yes.

Q. Okay. Do you recall what that evidence was, more particularly?

A. Again, I just, in fact, generally, I believe the lady, young lady testified that she had seen a man, with, I can't really remember the combination, it was like blue shorts and a white shirt or blue shirt and white shorts, something to that effect. And she knew enough about this individual to be able to tell -- to direct them to the house where Mr. Gibson was staying at the time.

Q. And was the clothing that was found at the house, did that in any way tie your client to the crime scene?

A. I honestly don't recall.

Q. All right. Do you recall whether there was any physical evidence tying your client to the crime scene?

A. Well, again, there was all this blood, all over everywhere, that I believe matched the -- the bloody money found there in the very room in which he was located matched the blood type of the alleged victim.

Q. Were there any particular articles of clothing that had left any -- or that matched in any way any evidence left at the crime scene?

A. Might have been some gloves or a sock or something, but I just don't recall.

Q. Have you reviewed the trial transcript in preparation for your testimony here?

A. No.

Q. All right. And when did this trial occur?

A. 1990, I believe.

Q. Okay. Do you recall any tennis shoes being a factor in evidence in the case?

A. I believe there was a footprint. I remember something about some prints. There was a palm print, I recall, that was found on the door jam. There may have been some bloody footprints and then they matched the shoe print to the bloody footprint that was at the scene.

Q. Would the trial transcript be the best evidence of that?

A. It certainly would.

Q. Based on your recollection. All right. Did you discuss what you found from the State's evidence with Mr. Gibson?

A. Yes.

Q. Was Mr. Gibson able to give you a version of the events?

A. Yes.

Q. Did that version of the events inculpate him in the crimes?

MS. WELLS: Your Honor, Mr. Gibson is without legal knowledge to know --

THE COURT: Ms. Wells, Ms. Wells --

MS. WELLS: -- he could object to this.

THE COURT: Ms. Wells, have a seat or either I will ask you -- or I will remove you. Do you understand that?

MS. WELLS: Yes, Your Honor, but this is ludicrous.

THE COURT: Thank you very much.

MS. WELLS: He doesn't have legal counsel.

THE COURT: And please remain quiet. Thank you very much. Go ahead, Ms. Whitaker.

MR. MULLIS: Your Honor, I would have to be relieved of my attorney client privilege, I think, to respond to that, if the Court would advise me. That would be well within the privilege.

MS. WHITAKER: Your Honor, there is case law that establishes that when a defendant or a petitioner makes a claim of ineffective assistance of counsel against his previous attorney that waives any attorney client privilege, and I can find you a case cite.

THE COURT: I am well aware of that law and let me ask Mr. Gibson. Mr. Gibson, do you have any objection to Mr. Mullis testifying to what you told him?

MR. GIBSON: Your Honor, I don't know what to do, I don't have an attorney.

THE COURT: Okay. Okay. Based upon the fact that he has made the claim of ineffective assistance of counsel, I will relieve you of that and grant you that waiver. Go ahead, Mr. --

MS. WHITAKER: Your Honor, just for the record, I'll cite Roberts v. Greenway, 233 Georgia 473.

THE COURT: Thank you very much. Go ahead.

A. The answer to your question is yes.

Q. All right. Had your client given any statements to the police?

A. Yes.

Q. And do you recall --

A. I assume you are speaking of before I talked to him?

Q. At any time.

A. Yes.

Q. All right. And, were those before you spoke with him?

A. Yes.

Q. Were those before you were his appointed counsel in the case?

A. Yes.

Q. All right. I)o you recall at what time period those occurred?

A. I think it was the very day of the homicide.

Q. All right. And did you review those statements with your client?

A. Yes.

Q. Were those statements also inculpatory?

A. Yes.

Q. Were there any inconsistencies, major inconsistencies, between what your client had told police on the day of the crimes and the version of events he gave you?

A. Frankly, no, there were inconsistencies, but -- and differences about motivation, but as far as the gist of it, no.

Q. Was Mr. Gibson able to provide you with any version of events or any information which you felt might have been a potential defense to the crimes?

A. Defense to the guilt-innocence

Q. Yes.

A. -- issue?

Q. Yes.

A. No.

Q. What -- did he provide any motivation or any rationale to the police in his statements for the crimes?

A. I believe his statement to the police was that, that he needed money. He was using crack cocaine and went there to get some money -- the store with an eye toward robbing the victim and that it got out of hand.

Q. In your discussions with Mr. Gibson did he give you any motivation for the crime?

A. More of the same. The same type statement.

Q. All right.

A. He did -- let me back up. At one point he indicated that he had been, and, again, I don't recall the chronology exactly, but he had been in the store earlier on an occasion with a relative or friend and had complained about the price of some product and maybe said -- maybe cursed or used some profanity and the victim said, or someone who was operating the store, I think it was the victim, said something to him like, "hush, don't talk that way in here. If you are going to talk that way in here, get out". And, you

know, there was a little animosity there. And we tried to use that to the extent that we could.

Q. Did you request a charge on voluntary manslaughter?

A. I am sure I did.

Q. Do you recall whether the charge was given?

A. No, I don't.

Q. Did you believe that that was --

A. I believe, let me interrupt. I believe it was.

Q. Do you recall -- was your view of that version of the events that Mr. Gibson provided, did you believe that that was going to be sufficient evidence to establish voluntary manslaughter?

A. My personal opinion?

Q. Yes, as trial attorney and as a defense attorney.

A. I thought it was very unlikely.

Q. Did you

A. But --

Q. I'm sorry.

A. -- I felt like we had to pursue it.

Q. Did you explore any other potential defenses to the guilt innocent-phase in this case?

A. Well, of course, the issue of Mr. Gibson's mental status, his competency bore m the guilt-innocence.

Q. And did that arise in the case?

A. Well, naturally, in a case of this gravity, we requested -- he was examined by the people at Central State Hospital, and we also requested funds for an independent examination to determine his level of intelligence and emotional state.

Q. Was your motion for an independent evaluation, was that following or previous to, at the same time as the Court ordered evaluation, if you recall?

A. I think it -- I feel like it would have been subsequent to the Court ordered evaluation.

Q. Was that motion granted?

A. Yes.

Q. And did an independent evaluation of your client occur?

A. Yes.

Q. All right. And do you recall who the doctor was who provided that evaluation?

A. Dr., I believe, it was George Anderson, I believe is his name. He is out of Dublin. He's a psychologist over there.

Q. And was this a psychologist that you have familiarity with?

A. Yes.

Q. Had you used him in previous cases?

A. I had.

Q. All right. And was there anything of benefit to your client's case in the results of the Court ordered evaluation?

A. I don't recall anything that -- I believe they indicated that Mr. Gibson was in the lower range of normal intelligence or the high range of mental retardation, perhaps. I don't recall -- I don't believe that they categorized him as retarded, but they said that his I.Q. would have been, I believe, in the 80's or high 80's or something of that nature,

Q. Did you receive a copy of the court ordered evaluation?

A. Yes.

MS. WELLS: I would like to have this marked as Respondent's Exhibit 1.

Q. You can take a look at that and tell me whether you recognize that document?

A. This appears to be the letter which was prepared by Dr. Robert J. Storms of Central State Hospital, pursuant to the Court ordered evaluation.

Q. Right. And would you have kept a copy of that in your file?

A. Yes.

Q. Did you review that evaluation?

A. Yes.

Q. Did you contact Dr. Storms at any point prior to the trial in this case to discuss his findings?

A. I did.

Q. All right. And do you recall by what means you communicated with Dr. Storms?

A. Telephone.

Q. And what was the result of your telephone communications with Dr. Storms? Was he able to provide you with any useful information to help your client?

A. I would have to look in my file. I've got a transcript. I believe I taped with his permission, I tape recorded the conversation, I believe. And I think I have a transcript of that.

Q. Did Dr. Anderson provide you with a copy of any written findings based upon his evaluation of your client?

A. He did.

Q. Did you review those findings

A. Yes.

Q. And did you have any discussions with Dr. Anderson about those findings?

A. I did.

Q. And, again, do you recall what the mode of communication with Dr. Anderson was?

A. Telephone.

Q. And was Dr. Anderson able to provide you with anything that you felt would have been beneficial to your client? Any information?

A. Not really.

Q. I hand you what I've marked Respondent's -- this is a document stapled together that I've marked, in sections, Respondent's Exhibit 2-A, 2-B, and 2-C and ask you if you recognize those? And if you could address each of those, whether or not you recognize each of those sub-parts?

A. All right. 2-A appears to be a copy of a cover letter which accompanied Dr. Anderson's written report. The next page is the first part of the report on through, I believe it runs six pages. Then I have -- 2-B is a transcript of a telephone conversation with, between myself and Dr. Anderson of June 2, 1990. And- 2-C is a telephone -- a transcript of a telephone conversation between myself and Dr. Storms of May 15 of '90. I believe that's it.

Q. Do those documents accurately reflect the transcripts that are kept in -- were kept in your defense file in this case?

A. Yes.

Q. Did you discuss with Dr. Storms and Dr. Anderson the possibility of a mental retardation defense in this case?

A. Yes.

Q. And were -- what were their conclusions what was Dr. Storms conclusion with regard to that issue?

A. May I refer to this?

Q. Certainly.

A. Dr. Storms's result you asked about?

Q. Yes.

A. Well, on this written report Storms characterized Mr. Gibson as functioning within the average range of general intelligence. In the telephone conversation I asked him, I said, "Do you have an I.Q. figure?" And he said, "Yes, it is somewhere in the 80's, actually I can't remember." He said, "I wanted to make sure that he was not mentally retarded first of all and he is well out of that range, there is no question". I said, "Even with an I.Q. in the 80's?" and he said, "No, that is still average". That was his, Dr. Storms', response.

Q. All right. Was Dr. Anderson's finding with regard to that issue consistent with Dr. Storms'?

A. I believe so. He gave him a full range I.Q. score of 76, borderline range of intelligence. But in my telephone conversation -- this is always what's so spooky about talking to psychologists. In our telephone conversation, I said, "In your report you described him on a couple of occasions as borderline intelligence. What does that signify to you?" his response was, "Actually he's-brighter than that, but that's how he scored. He just doesn't have any motivation. He didn't act like he cared one way or the other. He's about a half a peg below average. He's certainly not retarded." This is what Dr. Anderson said to me by telephone.

Q. All right. So based on those discussions with the two doctors who had conducted evaluations of your client, did you believe it would be fruitful to pursue a mental competency any further?

A. No.

MS. WHITAKER: Your Honor, at this time, I will show these exhibits to Mr. Gibson and then I will enter them into the record.

THE COURT: Mr. Gibson, do you have any objection to those?

MR. GIBSON: I don't have any attorney. I don't know what to plead.

THE COURT: Pardon?

MR. GIBSON: I don't know what to plead.

THE COURT: Well, I'm just asking you, do you have any problem with those being introduced into evidence?

MR. GIBSON: I don't have an attorney.

THE COURT: Okay. They're admitted.

Q. Mr. Mullis, did you consider the possibility of any type of drug addiction defense in this case to guilt-innocence?

A. I did consider that because Mr. Gibson had related his history of using crack cocaine. However, well, that answers your question.

Q. All right. You did not eventually present any defense based on drugs. Why did you reject that as a defense?

A. Well, we didn't present, I don't know if it is entirely accurate to said that, we certainly presented that, believe, in the mitigation phase, but in the guilt-innocence phase.

Q. Yes, that's what I'd like for you to address at this time, the guilt-innocence.

A. Right. Well, first and foremost, of course, voluntary intoxication is not a defense. Secondly, in my own observation of Mr. Gibson shortly after, days after he was arrested and throughout the trial, first and foremost, I never observed anything consistent with my previous observations in some defendants of drug withdrawal or any sort of organic type of brain damage resulting from alcohol or drug abuse or

anything of that nature. He did not relate any history of treatment for drug abuse that I can recall. There just didn't seem to be any evidence along those lines other than his own anecdotal statements.

Q. Did either Dr. Storms or Dr. Anderson turn up in their evaluation with Mr. Gibson any evidence of a prior drug history?

A. No. Well, I'd want to-take that back. I'd have refer to the written report. I just don't -- they may have said that he related a drug history, but I don't recall that

Q. Any prior institutionalizations for

A. No.

Q. -- drug reasons?

A. No.

Q. Did you review the statements that he had given to the police on the day of the crimes for any evidence of your client being under the influence of drugs?

A. I did. We had the advantage, if you want to call it that, at least as bears on this issue, of having the video taped interview with law enforcement that was made, I believe, the day of the occurrence, late, later in that evening, an interview with the G.B.I. agent interrogation, that's what it was. So I had an opportunity to observe him at that time as well.

Q. Did he appear on that video tape to be under the influence of any drugs?

A. No.

Q. Do you recall whether during that statement that the police questioned him at all about being under the influence of any drugs?

A. I don't recall.

Q. Did you review the first statement?

A. You say the first statement, there was a statement he gave to the Sheriff of Dodge County, I believe,

that I think preceded the statement that was given to the G.B.I.; that's my recollection. I reviewed everything that they made known to us.

Q. Did you see anything in that statement that would have been helpful to any kind of a drug defense?

A. I just, honestly, I don't recall the substance of that statement. I'd have to, you'd have to show it to me.

Q. Was there anything in the discussions that you had with Mr. Gibson other than his anecdotal relating that he had used some crack prior to the crimes that you felt would have been beneficial to some type of a drug defense in the case?

A. No.

MS. WHITAKER: At this time, I would like to review some of the motions that you filed in the case, and, Your Honor, has been previously provided with a copy of the record in the case?

THE COURT: Yes, ma'am.

MS. WHITAKER: We are not going to tender that because that's already in the record of the Supreme Court.

Q. Mr. Mullis, if you will just refer to the record at this point, to the index, and I would like to review your rationale for filing some of the motions which you filed. It appears you filed a motion for in camera inspection and for production of documents, I believe, we've already discussed that issue; would that have been part of your discovery efforts in the case?

A. Yes.

Q. All right. And, likewise, would the demand for list of witnesses and copy of indictment also have been a part of your discovery efforts in the case?

A. Yes.

Q. All right. You also filed a motion for pre-trial hearing to determine the voluntariness of defendant's statement. Is that the motion that you were referring to previously in your testimony, to challenge, your client's statement?

A. I don't recall referring to that, but --

Q. I'm sorry, did you challenge the statements that were given to the police by your client?

A. Certainly.

Q. All right. Would this have been the motion by which you did that?

A. Yes.

Q. Was there a hearing on that motion?

A. I'm sure there was.

Q. Do you recall it in any particularity?

A. No.

Q. Now you filed a motion for a change of venue. Do you recall the circumstances of your-filing of that motion?

A. Well, the victim in the case was a black man who operated, as I said, a small convenience store there in Eastman. Eastman is a small town. I don't know the population for sure, but it's probably maybe 10,000 people. It's a small community and the victim was well-known. As I learned in voir dire, he was even more well-known than I had anticipated. There was some publicity, newspaper coverage, in the community. Some of it I thought was inflammatory, and I think they referred in some article to Exzavious Gibson who killed so and so. This was before the trial, as if it were a foregone conclusion. So, I felt that it was in his interest to request a change of venue.

Q. Did you present evidence in your motion for change --or in -- let me rephrase. Do you know, was there a hearing on your motion for change of venue?

A. Yes.

Q. All right. In that hearing did you present any evidence of pre-trial publicity in the case?

A. I presented what there was, yes.

Q. All right. And was the motion successful?

A. No, I think, as is usually the practice, the Judge sort of denied it for the tire being and deferred final ruling until we had the voir dire, but even after the voir dire, as far as -- I mean, he didn't see it my way.

Q. Had you renewed the motion at the time of voir dire?

A. I think so.

Q. In the voir dire of the potential jurors in this case, did you have -- did you consult with anyone about the potential jurors in the case?

A. Yes.

Q. All right. Did you have any familiarity with the local population?

A. Somewhat, yes, a good deal of my general practice comes out of Dodge County, although I do not practice, I don't have an office in Dodge County, I'm in Bleckley County, but, yes, I know a lot of people there.

Q. In your voir dire of the potential jurors did they appear, in your opinion, to be tainted by pre-trial publicity?

A. You know, I can't recall if any were excused for cause as a result of pre-trial publicity. I remember distinctly that I was somewhat surprised that there were as many whites that knew the victim, if not more, than blacks on the jury panel as a whole and that the number of whites that patronized the store, I was a little surprised by that.

Q. Is it correct that both your client and the victim in this case were black?

A. Yes.

Q. Did you -- was there any Baton type issue present in this case following the voir dire?

A. Not that I recall. I don't remember the ultimate racial composition of the jury, but I certainly don't recall any Batson problem.

Q. All right. Would you have presented such a challenge at that time if there had been one?

A. I am sure I would have. I mean, if, as I said, we were between, in term of picking a jury, we were between a rock and hard place because the victim was black and the number, large number of whites that knew the victim, you know, it kind of, we couldn't, in the popular parlance play, the race card very well.

Q. How did you feel about the jury that was chosen to try the case? Did you feel like that was going to be a jury sympathetic to your client?

A. I can only compare it to other cases that I have tried, and I felt that it was, seemed like they would be a fairly fair jury. You never know what people have heard or who they have talked to. I can't read minds, but they felt, they seemed to be attentive throughout the case and didn't give any visual signs that they had reached any previous conclusion.

Q. Did you file any motions with regard to voir dire as to the death penalty issues in the case?

A. I'm not sure. We filed a request for a reverse Wetherspoon type of question. I don't recall. I think the Judge may have given it, may have used it, I just don't recall. I think we had a juror, a juror questionnaire in this case as well. But I'm, again, not sure of that.

Q. What was the State's evidence in aggravation in this case?

A. Well, of course, it was an armed robbery type situation. The victim and the perpetrator were relative strangers. The victim was cut, I believe, according to the

autopsy staff, some 39 times or cut in various places on his body 39 times. The knife was actually broken off into the vertebra, somewhere in his back or neck. It was, it was just a very bad homicide. And that was the primary aggravation in the case.

Q. Did you review a copy of the autopsy report prior to the trial?

A. Yes.

Q. Did you -- were you able to discuss the autopsy report with the autopsist in the case prior to trial?

A. I do not recall doing that. I really don't. If I did, I don't recall that.

Q. Did you cross examine the autopsist during the guilt-innocence phase of the trial?

A. I know he testified. Whether I asked him any questions, I don't recall. In a case of this nature, cross examining an autopsist can be sort of like cross examining the victim's mother. You have be extremely careful or you can make it worse, and I just don't recall whether I did or not.

Q. You mentioned that a knife wound that had broken off the knife in the victim's body; do you recall that have being of any particular significance in the case?

A. There was some testimony, I believe, from the pathologist or whoever performed the autopsy that he was of the opinion that this would have resulted in paralysis at that instance, and thereafter the victim would have been prone, I believe.

Q. Let me refer you to the examination of the autopsist in this case.

MS. WHITAKER: I believe Your Honor also has a copy of the trial transcript.

THE COURT: I do.

MS. WHITAKER: This will be the testimony of Dr. Chris Berry which begins on page 327 in the transcript.

Q. Mr. Mullis, if you could just review that to determine whether you did cross examine this witness in the case?

A. Yes, I did.

Q. Can you tell from that cross examination whether your had had any prior conversations with Dr. Sperry about his findings?

A. Yes, I said -- I introduced myself to the witness and I said, "I believe I spoke to you by telephone back on May 31; do you recall that?" and his response was "Yes".

Q. Can you determine, reviewing your cross examination further, any significance that the knife wound that you mentioned may have resulted in paralysis prior to death, in the guilt-innocence or the case in aggravation?

A. I asked him if it were possible that the knife wound to the neck where the knife was broken off was the final wound, the last stab that took place, and I got him to admit that in our telephone conversation, he had told me that that was a possibility.

Q. And why would that have been of benefit to your case?

A. Well, it would mitigate somewhat in that they were presenting the scenario that when the knife went into the neck the fellow was paralyzed and couldn't move and that possibly Gibson or whoever continued to stab the man after he was no longer struggling. And I was trying to make the point that perhaps there were no stabs -- that this knife fight or stabbing occurred as a result of a physical confrontation in an effort to rob and that once the victim ceased struggling that Gibson withdrew and didn't continue to perpetrate this stabbing.

Q. And what was Dr. Sperry's opinion at trial based on the physical evidence of whether that was, in fact, the scenario that had occurred?

A. Well, I accused him of trying to change his story in the cross examination.

Q. Would that have been beneficial as far as the credibility of that witness before the jury, if you were able to do that?

A. Yes, the impeachment. I think, I think if I remember correctly, maybe he was trying to argue or his position was that the nature of some of the cuts indicated that they were done with the broken edge of the knife which had to have taken place after the stab wound to the neck.

Q. Now, do you recall that there was an issue, pre-trial and during the trial about your subpoena of Dr. Sperry and other GBI witnesses, potential witnesses?

A. I believe that we had subpoenaed or attempted to subpoena some of their lab data which I anticipated their response to that or the response of the Office of Attorney General which was to move to quash the subpoena and request sanctions against myself.

Q. Now, that was the state of the law at that time with regard to the issue of subpoenaing the documents and other crime lab information?

A. Well, as I recall, at the time, there was -- it was in question. There was -- the door seemed to be cracked open a little bit about that and there was a case up on appeal, I believe at the very time that that took place arising out of the same circuit where I practice law. So, I felt like this was an issue that was worth raising on appeal as we subsequently did.

Q. All right. Did you have -- did you do any research into that issue, in raising it as an issue in your trial?

A. Yes.

Q. All right. Do you recall what the scope of that research was?

A. No -

Q. All right. You mentioned that --

A. Well, I recall, let me just say this. I remember the chief progenitor or proponent of that live argument is an attorney in Dublin by the of Wash Larson, and I believe I spoke to Wash about it before I filed the motion.

Q. Do you recall whether he was able to provide you with any helpful information?

A. I think perhaps he had provided me with copy of the brief that he had filed in that connection in the case that he was working on.

Q. And did you raise this as an issue in the appeal in this case?

A. Well, frankly, I withdrew the motion, I believe, at the trial, if I remember correctly. We withdrew the motion because of the Attorney General's efforts to seek sanctions against myself for filing the motion. There was concern or the argument made that I was not going to expose myself to the contempt of the Court and we withdrew the motion, but we did raise the issue on appeal about the Attorney General's office effort to quash the subpoena.

Q. Was the appeal on that issue successful?

A. No, and, I might add that, to my understanding, Larson was ultimately not successful in his line of argument on this issue about discovery of these records.

Q. All right. I provide you with what Is been marked with Respondent's Exhibit 3, which I will show to you, Mr. Gibson, and ask you do you recognize that document?

A. It's a letter, copy of a letter, from myself to Mr. Larson back on June 11, 1990, thanking him for a copy of the brief that I referred to earlier.

Q. And what was that case?

A. Mr. Larson's case?

Q. Yes.

A. I believe it was, the fellow's name was Eason.

Q. And was that the case that eventually decided the issue with the Supreme Court, in the Georgia Supreme Court?

A. I think so.

Q. Was that the case that you were referring to?

A. Yes, yes.

MS. WHITAKER: Your Honor, I tender Respondent's Exhibit Number 3.

THE COURT: Any objection, Mr. Gibson? Any objection?

MR. GIBSON: I don't have an attorney, Your Honor.

THE COURT: okay, admitted.

MS. WHITAKER: Thanks.

Q. You mentioned that you had withdrawn the subpoenas in the case. Do you recall which witnesses from the GBI did testify in the case?

A. From the GBI?

Q. I'm sorry from the crime lab?

A. Well.

Q. Excuse me.

A. Sperry testified, Dr. Sperry. I don't recall there may have had, I'm sure they had, someone probably about blood and possibly fingerprints or shoe prints or whatever. I don't recall who they were.

Q. Turning to the sentencing phase of the case, were you able to develop any mitigation case to present on behalf of your client?

A. Yes.

Q. And what was that case, what was that theory?

A. Well, really, two-pronged, I guess you would say. One was his youth at the time of the incident. If I remember correctly, he was only 17 at the time this took place. I believe he turned shortly -- I believe by the time we had got to trial he had turned 18, if memory serves. And Exzavious's background, his upbringing, his family life or lack thereof. I tried to present that to the jury. He had basically been from pillar to post all of his life.

Q. Did you --

A. He never had any kind of -- much of a homelife.

Q. Were you able to contact any witnesses in regard to that to his background?

A. Yes, I remember speaking to an aunt, who I believe subsequently testified at trial who did as much as anybody to raise him. I believe it was Ms. Christopher. I think she was from Maryland or somewhere, the Mid-Atlantic.

Q. Were there any witnesses in the Eastman area that you were able to talk to about Mr. Gibson's background?

A. I want to say there was a young lady there in Eastman, but I -- who may have been a friend of his and known him for a short while before this took place. Because he had only been in Eastman for relatively -- just a bare, few number of weeks before this took place.

Q. Did you talk to any other family members other than the aunt who testified at trial?

A. I spoke to a lady down in Florida, I can't recall her exact relationship, if she was an aunt or what, and I believe I spoke to Mr. Gibson's grandmother.

Q. Do you recall the names of any of these people?

A. There was an Addie Johnson. I don't recall exactly which lady she was.

Q. Was she the lady from Florida, to your recollection?

A. I can look at my file.

Q. If you would.

A. I might add that Mr. Gibson's mother as I was told, Mr. Gibson's mother was deceased, herself a victim of a homicide. Mr. Gibson's father, biological father, had played little or no role in his upbringing.

Q. Were you able to present that mitigation evidence in the case?

A. I'm sure we did. There was a -- I have a Jackson that I spoke to who was apparently an aunt.

Q. Did Lula Jackson eventually testify at trial?

A. I don't recall. I really don't.

Q. Did you find out any of the family members other than Falstein Christopher to be particularly helpful to your mitigation case?

A. No, Falstein was the one that took the most interest in, as far as my dealings with them, who took the most interest in Exzavious and his situation.

Q. You mentioned previously that you spoke with the grandmother or someone you believed to be the grandmother?

A. I believe I spoke to, again, I don't know that she was his grandmother. I believe I spoke to the lady that lived there in the house where he was arrested.

Q. What was your impression of her?

A. Sort of like she, I mean, didn't want to get involved. I mean, it wasn't that she wasn't concerned, but it

was just that she didn't have a great deal to offer in the way of helping me with Exzavious' case.

Q. Did you have an investigator to assist you in this case?

A. No.

Q. Did you consider moving for funds for an investigator?

A. I probably considered it, but did not do it.

Q. All right. Any particular reason why not?

A. Frankly, I just didn't see the need for it. Again, with the open file policy and the statements that I had taken from Mr. Gibson himself, there were -- any discrepancies were just pretty minor between what he was telling me and what the State was showing me.

Q. And you mentioned the fact that you didn't present a guilt-innocence -- any testimony at the guilt-innocence phase. is that right?

A. Did not present any testimony?

Q. At the guilt-innocence phase?

A. I don't recall testifying to that, but I don't know that we did. I would just have to refer to the record.

Q. All right. If you would again.

A. Sure.

Q. That's the trial transcript.

A. No, we did not.

Q. All right. Do you recall why you didn't present any evidence at that phase of the case?

A. Obviously, it just wasn't, I mean, there wasn't anything that I knew that I felt would be helpful in regard to guilt-innocence.

Q. Would there have been a -- or did you consider the possibility of a plea to the guilt-innocence phase and sentencing before the jury?

A. Yeah, I considered that, but, first of all, I saw no reason in giving up the requirement that the State prove guilt in a death penalty case. I didn't see any tactical advantage to be gained by doing that. I didn't see that that was going to create an impression in the jurors minds that we were a couple of penitents. I just didn't think that that was going to help any and, quiet frankly, I felt that it would be in Mr. Gibson's advantage to create as much of a record as possible.

Q. Do you mean for purposes of appeal?

A. Yes.

Q. If there were an eventual conviction?

A. Yes.

Q. Do you recall what other witnesses you decided to present in mitigation other than Falstein Christopher?

A. I'd have to refer to the record. It appears that we called Falstein Christopher, Sharon Lampkin Jordon and Mr. Gibson himself.

Q. All right. And what would you have done, if anything, to prepare Mr. Gibson to testify in the mitigation phase of trial?

A. Well, I'm confident that I would have conveyed to him that this was the most important thing he had ever done in his life or the second most important thing that held ever done in his life, and that he needed to convey to that jury his remorse and that a reason, you know, a reason that he should be spared.

Q. Do you recall your impression of how successful his testimony was in playing out those two roles?

A. I thought it was, I thought his testimony was pretty good. I thought Exzavious made a pretty good

witness. As you know, we were able to prevent the State from using the videotaped statement which the interrogation that the GBI conducted shortly after the homicide, which I felt would have been very damaging, especially given his demeanor in that statement. I thought Exzavious made a pretty good witness. You know, you can only go by what other people tell you after the fact, but several of the court room observers said that they were pretty sympathetic to Mr. Gibson's plight and would have, you know, maybe done it differently as far as the ultimate verdict.

Q. Were you able to uncover any history of abuse in Mr. Gibson's childhood?

A. Gibson related to me that, I think, that Falstein had used corporal punishment and maybe gone overboard on occasion in that regard. I believe, he told me that. That's really all I was able to develop. He never told me you know, go up to Maryland or call the people in Maryland or call DFACS in Maryland and they will tell you, oh Lord, Falstein was the worst, most abusive mother, none of that. He never related that there was any history of the authorities getting involved or anything of that nature.

Q. Do you recall whether you investigated that issue further with Falstein herself?

A. I don' t recall. I think that I probably did, but I just don't recall particularly.

Q. Were your meetings with Falstein prior to the trial over the telephone or in person?

A. I know met with her in person on more than one occasion, but I may have spoken with her by phone as well, because Irecall, I believe she went back to wherever it is she lives. She came down at some point, after, not long after he was arrested. That's where I met some of the other ladies that I spoke to. I recall speaking to some other family members along with Falstein. I believe they came to my office in Cochran and I interviewed them there.

Q. Were any of the other family members able to substantiate Mr. Gibson's stories of corporal punishment or abuse in his childhood?

A. Not to my knowledge.

Q. Did you consider having Mr. Gibson testify to that issue only on his own testimony?

A. Probably considered it, but, again, I don't recall. I don't recall that he did, and I don't recall that -- there was nothing that in my mind that made me think that that would be productive.

Q. Did Mr. Gibson have a criminal background?

A. My understanding was that he had some sort of -- he had left Maryland or whatever state it was up there under a cloud. He had some sort of aggravated assault charge up there that was, I believe, pending, and I think he went to Florida initially and I don't know if something happened there or not, but then he ended up in Eastman. And he had -- there was -- he was charged with another, some sort of crime, a robbery or something, the day before this took place, this homicide. I say he was charged, after the homicide, he was charged or implicated in this other incident.

Q. Were you aware of that incident at the time of trial?

A. Yes.

Q. Did you consider the possibility that his prior criminal background might be of any mitigating value?

A. No.

Q. How do you -- how did you think that would have played with the jury?

A. Well, I mean, I -- my efforts were directed toward keeping that out of their consideration in the case. I would think that as a juror that evidence that this individual has been involved in previous violent crimes, possibly

involving weapons, would only serve to aggravate the situation.

Q. Would that have been contrary to your theory that he was a young guy and should have been shown mercy?

A. Yes.

Q. What did the State present during the sentencing phase as their aggravation?

A. If I may have a moment. They presented evidence of an escape attempt that Mr. Gibson had made while he was incarcerated awaiting trial on these charges. That was, I mean, I can go further as well, but it was that.

MS. WHITAKER: I show Mr. Gibson what has been marked for identification, Respondent's Exhibit 4.

THE COURT: Do you want to look at that Mr. Gibson? Pardon?

MR. GIBSON: No, sir.

THE COURT: Okay.

Q. I submit this to the witness. Do you recognize that?

A. You've handed me an exhibit marked Respondent's Exhibit 4. This is four pages. Appears to be a photostatic copy of some documents which were seized from Mr. Gibson's cell shortly after the escape attempt or at the time of the escape attempt.

Q. Were those -- originals of those presented as a part of the State's sentencing phase case?

A. I don't recall. I think the originals were used. I don't see why they wouldn't have been, but I know this was introduced.

Q. The originals or copies thereof?

A. Yes, Yes.

Q. All right. Do you recall whether you made any objection to the introduction of that evidence?

A. I did and we raised it on appeal as well.

Q. Now, did you have -- were you aware of this escape attempt prior to trial?

A. Oh, yes.

Q. Were you aware of that particular document prior to trial?

A. Yes.

Q. All right. And what is that document?

A. Well, it's a series of notes to the -- it says, entitled "To The Police." The second page is, appears to be a hand drawn cartoon and the, well, the third and fourth pages appears to be duplicates of one another, but this is a note entitled "To Whom It May Concern".

Q. And what's the subject of that note?

A. This escape attempt or the escape.

Q. And who was the author of that note?

A. Well, it was alleged to be Mr. Gibson.

Q. Is that the evidence that the State presented at the sentencing phase?

A. Yes, part of it.

Q. And did you discuss with Mr. Gibson that the State would probably present that evidence in aggravation at sentencing?

A. Oh, yes. I might even add that I discussed it before it happened. I told him, you know, part of my standard procedure with jail case clients is to sit down and say don't write anything, don't draw any pictures, don't talk to any fellow inmates, don't talk to the jailers, and don't try to escape. And I remember absolutely, positively, that I did that with Mr. Gibson before this took place.

MS. WHITAKER: I show Mr. Gibson what I have marked for identification, Respondent's Exhibit Number 5.

THE COURT: Do you want to look at that Mr. Gibson?

MR. GIBSON: No, sir.

Q. Mr. Mullis, do you recognize that document?

A. Yes, it's a copy of a letter of mine of March 27, 1990, which apparently was before the escape attempt, but that's just my conclusion, which I wrote to Mr. Gibson. I think I wrote this in response to a letter or some communication that he had presented to me.

Q. And what's the substance of that letter?

A. I said to him, "As I indicated to you in Court on Monday, it is extremely important that you refrain from writing anything directly concerning your case or making any drawings. I must admit that you have some talent in this area, but this is something you are going to have to avoid for a while. As I indicated to you, law enforcement will seize these and try to use them against you in a thousand different ways. There is no sense in worsening your situation. We will need all of the help we can get and there is nothing to be gained by giving the other side any ammunition."

Q. And was the drawing and the letter that has been marked Respondent's Exhibit 4 used in exactly the way you had predicted --

A. Yes.

Q. -- in sentencing against your client. What was your impression of the effect of that evidence on the jury?

A. I don't know. I really, really don't know. I, you know, the tenor of the note is very joking and condescending, but I, you know, I couldn't tell from the jurors. demeanor it made, what sort of impression it made, really.

Q. Were you able to present any evidence or conduct any cross examination to try to mitigate any effect, adverse effect, that that letter might have had on the jury in the case?

A. I recall there was, Gibson, they had Gibson in a cell at the city jail, which was a pretty bad place to be. As I described it once, it was sort of like a cell they had Hannibal Lechter in in the movie. It was just sort of sat out in the room, in the middle of the room, and it was a woven steel band enclosure. And he wanted to be in the county lockup, as I recall, anywhere, short of being out and free. He wanted to in the county lockup and, and they wouldn't move him. I think that we had asked that he be moved, and we tried to present that to the jury to show that his escape was motivated not out of a desire to abscond, but -- or his attempted escape was motivated not out of a desire to abscond, but just to get away from these circumstances. I don't, well --

Q. Do you recall how you presented that evidence?

A. No, I don't.

MS. WHITAKER: Your Honor, I will tender State's Exhibit Number 5, and, also, State's Exhibit Number 4, which is already in the record, but just for the convenience of having it as part of these hearings.

THE COURT: Now what is 1, 2 and 3?

MS. WHITAKER: What are they?

THE COURT: Did you tender those?

MS. WHITAKER: Yes, sir, I believe those are already admitted.

THE COURT: Okay. Any objection, Mr. Gibson?

MR. GIBSON: Your Honor, I don't waive any rights, but I don't have any counsel, so I don't

know what to say about anything you have asked me or anything [illegible] will ask me.

THE COURT: Okay. Okay. They're admitted.

MS. WHITAKER: Your Honor, if I could have just a second to mark a few more exhibits.

THE COURT: Yes, ma'am.

MS. WHITAKER: Thank you. This Respondent's Exhibits Number 6, 7 and 8 for identification.

THE COURT: Okay.

MS. WHITAKER: I show these to Mr. Gibson.

THE COURT: Do you want to look at those Mr. Gibson?

MR. GIBSON: I don't know.

THE COURT: Do you want to look at them?

MR. GIBSON: I don't have counsel, I don't have any idea what any of these --

THE COURT: I know that, but do you want to look at them?

MR. GIBSON: No.

THE COURT: Okay.

Q. Mr. Mullis, do you recognize these documents?

A. These are letters from Mr. Gibson to myself.

MS. WHITAKER: Your Honor, I would like to tender those exhibits as evidence of Mr. Gibson's apparent mental capabilities in the case and his understanding of his trial as it was progressing.

THE COURT: In relation to the claim of the ineffective assistance of counsel?

MS. WHITAKER: Yes, sir, and, additionally, in relation to what I anticipate to be issue on the appeal in this case which is that Mr. Gibson is pro se.

THE COURT: Mr. Gibson, do you have anything you want to tell me about that, anything want to say in that regard?

MR. GIBSON: I don't know what pleadings to make because I don't have counsel.

THE COURT: Okay.

MR. GIBSON: I don't waive any rights.

THE COURT: Okay, sir. They'll be admitted.

MS. WHITAKER: Your Honor, if I may have just a minute.

THE COURT: Yes, ma'am.

Q. Mr. Mullis, how did you go about determining which issues to raise on appeal in this case?

A. Well, of course, my own recollection of the trial, review of the transcript, consideration of the case law applicable thereto, conversation with the petitioner.

Q. Did Mr. Gibson have any issues that he indicated to you that he wanted you to address on appeal?

A. Not that I can recall.

Q. Did you discuss with him the issues that you were considering raising on appeal prior to filing the appeal itself?

A. I believe I did.

Q. All right. I have nothing further, Your Honor.

THE COURT: Mr. Gibson, would you like to ask Mr. Mullis any questions?

MR. GIBSON: I don't have any counsel.

THE COURT: I understand that, but I am just asking, can you tell me yes or no whether you want to ask him any questions or not?

MR. GIBSON: I'm not my own counsel.

THE COURT: I'm sorry, sir, I didn't understand you.

MR. GIBSON: I'm not my own counsel.

THE COURT: I understand, but do you want, do you, yourself, individually, want to ask him anything?

MR. GIBSON: I don't know.

THE COURT: Okay, sir. okay, thank you, Mr. Mullis, you can go down.

MR. MULLIS: Thank you.

MS. WHITAKER: Your Honor, I would like to at this time inquire of Mr. Gibson the circumstances of filing this petition.

MS. WELLS: Your Honor, this is improper, Ms. Whitaker can't ask --

THE COURT: Ms. Wells, Ms. Wells, Ms. Wells. I have warned you once. You stand up again and interrupt these proceedings, I'm going to ask them to escort you out. Do you understand that?

MS. WELLS: Yes, Your Honor.

THE COURT: Please have a seat.

MS. WELLS: But, I cannot sit back and watch this happen.

THE COURT: Officer, would you please escort her out of here, please?

MS. WELLS: Mr. Gibson cannot be expected to know what to do in this situation. He has no attorney.

THE COURT: Ma'am, ma'am.

MS. WELLS: He has no attorney.

THE COURT: Ma'am, you are not helping this man one bit, please leave.

MS. WELLS: Your Honor, he has no way of knowing --

THE COURT: We'll be in recess. And, Officer, I ask you to please escort her out, please.

[Recess]

THE COURT: Okay, Ms. Whitaker, anything else on behalf of the State.

MS. WHITAKER: I'd just like to ask that one question.

THE COURT: Okay, you want to inquire of him what?

MS. WHITAKER: I would like to inquire of Mr. Gibson whether he approached the Resource Center or whether with regard to the filing of this petition?

THE COURT: Okay. Mr. Gibson, can you respond to that, please?

MR. GIBSON: I don't recall.

THE COURT: You don't recall. Okay, sir.

MS. WHITAKER: I don't have anything further.

THE COURT: Anything else you'd like to say to the Court or present to the Court, Mr. Gibson?

MR. GIBSON: Nothing other than I don't waive any rights to this proceeding. I don't have counsel.

THE COURT: Okay. I understand that. Can you tell this for the record, Mr. Gibson, how old are you?

MR. GIBSON: Twenty-four.

THE COURT: And how far did you go in school?

MR. GIBSON: I don't recall.

THE COURT: Okay. Can you read and write the English language? I mean, I've noticed you taking notes there so, obviously, you can write the English language. I presume you understand it.

MR. GIBSON: I don't have any counsel, so I don't think I should - -

THE COURT: Are you under the influence of any alcohol or drugs at this time?

MR. GIBSON: Not that I know of.

THE COURT: Okay. Anything else on behalf of the State?

MS. WHITAKER: No, sir.

THE COURT: Okay. We'll be in recess. The Court will take it under advisement. We'll render a decision within the prerequisite, required period of time which is, what is it thirty, sixty?

MS. WHITAKER: I believe its sixty or a hundred and twenty days.

THE COURT: Sixty days, okay. Any other matters you think we need to take up or any other rights or advice we need to give Mr. Gibson, Ms. Whitaker, before we leave?

MS. WHITAKER: I think Mr. Gibson should be aware that this is his first habeas corpus proceeding and while -- and that if he chooses to file another one anything that he doesn't raise in this one is going to probably be found to be waived under Georgia Law.

THE COURT: With that statement, Mr. Gibson, do you have anything else you want to tell

me, anything else you want to tell the Court, any other evidence you want to present?

MR. GIBSON: No, sir.

THE COURT: Thank you very much. We will be in recess.

(HEARING CONCLUDED)